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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1159

ARNOLD F. HABIG and JEROME M. SCHROERING,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Petitioners, Arnold F. Habig and Jerome M. Schroering, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on January 24, 1973. The judgment reversed in part an order of the District Court for the Southern District of Indiana, Indianapolis Division. The district court's order suppressed Government evidence in a criminal case on the ground that the Government had violated the Petitioners Fifth and Sixth Amendment rights.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, the review of which is sought by this Petition, is not yet reported. A copy of the decision is attached hereto

as Appendix A, and a copy of such judgment is attached hereto as Appendix E.

There was no written opinion of the district court, but its order suppressing evidence contains findings of fact and conclusions of law. A copy of such order, entered May 11, 1971, is attached hereto as Appendix B.

The decision and judgment of the court of appeals involved in the instant matter is the second appellate proceeding involving the Petitioners' motion to suppress. The appellate disposition of the first appeal taken by the Government from the first order of suppression made by the district court is reported as *U. S.* v. *Habig*, 413 F. 2d 1108 (7th Cir. 1969), cert. den. 396 U. S. 1014 (1970). A copy of said opinion is attached hereto as Appendix C.

The Court of Appeals for the Seventh Circuit rendered a decision in *U. S.* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), which the Government elected to treat as a companion to the first appeal involving the motion to suppress in the instant case. The Court of Appeals for the Seventh Circuit agreed with the Government and considered the appeal in the light of the principles announced in *Dickerson*. A copy of the *Dickerson* opinion is attached as Appendix D.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered January 24, 1973.

The statutory provisions and Rules of this Court believed to confer jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. § 1254(1) and Rule 22(2). The Government appeal to the court of appeals from the district court's suppression order was authorized by 18 U. S. C. § 3731, pursuant to which the Government certified that the suppressed evidence consti-

tutes a substantial proof of the charges alleged against the Petitioners.

QUESTIONS PRESENTED.

Two questions of a somewhat interrelated nature are presented.

The first and primary question is whether or not an admitted violation by the Government of the Petitioners' rights under the Miranda Rule as to statements and information obtained through interviews with the Petitioners (which the Government concedes should be suppressed) requires the suppression, under the fruit-of-the-poisonous-tree doctrine, of corporate information, records, and documents, and leads to other evidence, the existence and location of which were disclosed by the Petitioners to the Government during the admittedly unlawful interviews. Simply stated, the basic question concerns the admissability of evidence obtained through leads resulting from interrogations conducted in violation of the Miranda Rule.

The second question is whether or not the Court of Appeals for the Seventh Circuit may render a decision against the Petitioners which holds, in effect, that the Petitioners have no standing to move to suppress certain evidence (1) where the appellate disposition is accomplished in such a manner as to ignore or fail to give effect to a stipulation by the Government of the standing of the Petitioners to move to suppress such evidence, (2) where the Petitioners, in the proceedings in the district court, relied upon the stipulation as part of their proof and (3) where the stipulation was relied upon by the district court in making the order of suppression. Simply stated, must a court of appeals give effect to a stipulation of standing made by the Government?

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment 5 to the Constitution of the United States provides in relevant part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law. . . ."

Amendment 6 to the Constitution of the United States provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE INCLUDING BASIS FOR FEDERAL JURISDICTION.

The writ of certiorari is sought to review a judgment of the Court of Appeals for the Seventh Circuit reversing and vacating in part a district court suppression order. (App., A7-10)[1] The suppression order (App., A11-64) was entered by the district court in a criminal tax prosecution of the Petitioners. The district court's order suppressed certain evidence on the grounds that it had been obtained by the Government in violation of the Petitioners' rights under the Fifth and Sixth Amendments to the United States Constitution. (App., A39)

The Petitioners were indicted under Sections 7201 and 7206 (2) of the Internal Revenue Code of 1954 [26 U. S. C.

1. Herein, "App." refers to the Appendix attached to this Petition; "Ct. Ap. App. I" refers to the certified appendix filed in the court of appeals on the first appeal from the order of suppression, and "Ct. Ap. App. II" refers to the certified appendix filed in the court of appeals on the second appeal from the order of suppression which resulted in the judgment for which this writ is sought.

§§ 7201 and 7206(2)], for attempting to evade income taxes of four corporations and for aiding and assisting in the preparation of a fifth corporation's income tax return which was averred to be false. (App., A39) The jurisdiction of the district court was based on 18 U. S. C. § 3231. The Government's appeal from the district court was authorized by and pursuant to 18 U. S. C. § 3731.

The proceedings involved in the instant matter commenced in 1968 when the Petitioners filed motion to suppress for use as evidence copies of certain corporate records, information, data and other evidence. (Ct. Ap. App. I, 13-18) After an evidentiary hearing (Ct. Ap. App. I, 63-145) during which both sides presented evidence, the district court entered an order of suppression. (Ct. Ap. App. I, 27-39)

Before and during the evidentiary hearing culminating in the first order of suppression, the Government conceded that Petitioners' standing to raise the motion to suppress (Ct. Ap. App. I, 72-73), and the Petitioners relied upon this concession of standing as obviating the necessity to present any evidence on the issue. (Ct. Ap. App. I, 72)

After the first order of suppression was entered, the district court denied the Government's petition for a rehearing on the motion to suppress. The objective of the petition for rehearing was to obtain permission to reopen the hearing for the purpose of introducing further evidence as to the chronology of events leading to the acquisition of the evidence which was ordered suppressed by the district court. (Ct. Ap. App. I, 40-46)

Pursuant to 18 U. S. C. § 3731, the Government appealed from the first order of suppression to the Court of Appeals for the Seventh Circuit (hereinafter referred to as the "first appeal"). (App. A65-71) *U. S.* v. *Habig*, 413 F. 2d

1108 (7th Cir. 1969) During the pendency of the appeal, the court of appeals also had under consideration a similar case involving an order of suppression made by a district court in a criminal tax fraud prosecution. This case was *U. S.* v. *Dickerson,* 413 F. 2d 1111 (7th Cir. 1969) (App., A72-83)

On the first appeal the Government regarded the instant case as a companion to the *Dickerson* case, and it was so treated by the court of appeals. (App., A69) *U. S.* v. *Habig,* 413 F. 2d 1108, 1110.

During this first appeal, the Government reaffirmed its concession of the standing of the Petitioners to question the copying of the corporate records. (App., A67) *U. S.* v. *Habig,* 413 F. 2d 1108, 1109 (7th Cir. 1969)

In *U. S.* v. *Dickerson,* 413 F. 2d 1111 (7th Cir. 1969), (App., A72-83), the Court of Appeals for the Seventh Circuit observed and held:

> "The Government's brief concedes that the indictment resulted from the information gathered at five of the earlier interviews. These are the occasions when, according to his affidavit, defendant answered the agents' questions and furnished them with documentary and oral information. . . ." (App., A73-74)
>
> . . .
>
> "Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division. . . ." (App., A80-81)
>
> . . .
>
> ". . . The defendant in the companion *Habig* case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. . . . (App., A82) *Id.* at 1113, 1116, 1117.

However, on the first appeal in this case, the Government was successful in its appeal from the district court's denial of its petition for rehearing with respect to the first order of suppression. The Court of Appeals for the Seventh Circuit observed and held:

> "In its principal brief, the Government admits that the suppression order was proper if *United States* v. *Turzynski*, 268 F. Supp. 847 (N. D. Ill. 1967) was correctly decided. In *Dickerson*, we have approved the rationale of the *Turzynski* case and have held that the advice of constitutional rights prescribed in *Miranda* . . . must be given to taxpayers suspected of criminal violations. . . . (App., A69)
>
> . . .
>
> ". . . If the Internal Revenue Service obtained all this evidence and the leads prior to the first contact with the defendants . . . or if any evidence obtained illegally thereafter was merely duplicative, the suppression order may not stand. . . . [T]he precise order of events is impossible on the present state of the record. . . . [W]e have determined that the interests of justice require a remand for a further hearing in order to develop the facts necessary to the application of the standards subsequently announced in *Dickerson.*" (App., A70) *U. S.* v. *Habig*, 413 F. 2d 1108, 1110, 1111 (7th Cir. 1969)

An application by the Petitioners for a writ of certiorari to review the foregoing decision was denied by this Court. *Habig* v. *U. S.*, 396 U. S. 1014 (1970).

Pursuant to the mandate of the Court of Appeals for the Seventh Circuit, the district court conducted a further evidentiary hearing "in order to develop the facts necessary to the application of the standards subsequently announced in *Dickerson.*" (Ct. Ap. App. II, 40-218) Consistent with the initial and continuing concession of standing, the issue of standing was not the subject of any evidentiary inquiry at the hearing.

Following the hearing, the district court entered an order suppressing certain evidence consisting of statements and information secured through interviews with the Petitioners and evidence consisting of corporate records and evidence obtained through leads from such records. (App., A11-64 at 39-47) However, not all of the Government's evidence (some of which consisted of corporate records) was suppressed. (App., A47-49) The district court concluded (1) that the suppressed evidence was obtained from and through the Petitioners on whom the investigation was focused from its inception (App., A38), (2) that the evidence was not duplicative of any evidence which the Government had obtained prior to the focusing of the investigation (App., A38) and (3) that the evidence had not been acquired by separate and independent means and sources. (App., A38)

On appeal from this second order of suppression, the Court of Appeals for the Seventh Circuit posited the general issue on the basis of Fourth Amendment considerations as follows:

> "... A separate question relates to whether any fourth amendment violations occurred during the Government's investigation which would require suppression of the questioned evidence. . . ." (App., A2)

As to the application of the rule in *Dickerson*, the court of appeals observed:

> "... The Government in the first appeal conceded that the rule we would fashion in *Dickerson* should apply to the instant prosecution. The concession was improvident and led us to imply that the rule announced in *Dickerson* controlled this case. . . ." (App., A5)

The court of appeals posited the specific issue and held:

> "... The question before us here is whether the rule announced in *Dickerson* applies to corporate records

and leads obtained by Internal Revenue agents for use as evidence in a criminal prosecution. We hold that it does not." (App., A6)

However, in its opinion, the court of appeals observed by way of a footnote:

"2. The Government concedes that *Dickerson* serves to bar the admission into evidence of all oral statements made by Schroering and Habig after Hicks came into the case. We do not, therefore, modify that portion of the district court order suppressing oral statements." (App., A6, fn. 2)

As to the matter of standing, the court of appeals stated:

". . . No claim is made that either Habig or Schroering ever asserted that the corporate records requested by the agents were not possessed by them and that the deception found by the trial court to have been practiced served subsequently to induce their unknowing revelation of the location of absent records. . . ." (App., A7)

REASONS FOR GRANTING THE WRIT.

The events and proceedings leading to this petition may be characterized as somewhat unusual because of the tortuous journey this case has thus far experienced. The reasons for granting the writ are intimately related to the course of proceedings, and the unusual length and relative factual complexity of this petition are attributable to this journey.

Two important issues are involved. The first concerns the application of the fruit-of-the-poisonous-tree doctrine with respect to a violation of the Miranda Rule. The second poses the question of whether or not a court of appeals can ignore a stipulation of ultimate fact to the prejudice of a party who relied upon the stipulation as part of his proof in the district court.

1.

Evidence Obtained as Fruits of Interviews Conducted in Violation of the Miranda Rule Must Be Excluded.

The importance of the question as to the application of the fruit-of-the-poisonous-tree doctrine as to evidence obtained as a consequence of interviews conducted in violation of the Miranda Rule is well-illustrated by the instant case which is one of a class of criminal prosecutions which rely heavily upon documentary evidence; a class of prosecutions the Petitioners would characterize generally as involving white-collar crimes.

The Petitioners would pose the issue as follows:

> Are statements constituting admissions of conduct involving some type of physical criminal act obtained in violation of an accused's rights to be accorded a different and superior exclusionary status than documentary evidence obtained as the fruits of statements obtained in violation of an accused's rights?[2]

---

2. As to the applicability of the doctrine of the fruit-of-the-poisonous-tree in a case involving the Miranda Rule, the issue appears unresolved. Speaking for the court in *Miranda* v. *State of Arizona*, 384 U. S. 436 (1966), Chief Justice Warren observed:

> ". . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him." *Id.* at 479 (Emphasis added.)

However, in his dissenting opinion in *Miranda*, Mr. Justice White observed:

> ". . . Today's decision leaves open such questions as . . . whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation. . . ." *Id.* at 545

The doctrine has been applied to exclude evidence in the following cases: *State* v. *Mitchell*, 270 N. C. 573, 155 S. E. 2d 96 (1968); and *Commonwealth* v. *Leaming*, 432 Pa. 326, 247 A. 2d 590 (1968).

See also, 3 *Wigmore, Evidence* § 859, p. 554 (Chadbourne rev.) which reviews recent decisions involving the issue.

The instant case clearly illustrates the issue involved. On the latest appeal, the Government acknowledged that all oral statements made by the Petitioners after a criminal investigation focused upon them were subject to suppression. The court of appeals observed:

> "The Government concedes that *Dickerson* [*U. S.* v. *Dickerson*, 413 F. 2d, 1111 (7th Cir. 1969)] serves to bar the admission into evidence of all oral statements made by Schroering and Habig after Hicks came into the case. We do not, therefore, modify that portion of the district court order suppressing oral statements." (App., A6, fn. 2)

In its latest order suppressing evidence, the district court concluded:

> "7. The plaintiff's [Government's] agents after February 11, 1964 had the duty upon the first contact with defendants to advise them of their constitutional rights and advise them that they were the subject of a criminal investigation. The statements, information and leads to evidence obtained by the plaintiff's agents from the defendants after February 11, 1964 were illegally obtained by reason of the failure of the plaintiff's agents to fulfill such duty as the criminal investigation was focused on the two (2) defendants from and after February 11, 1964." (App., A39)

The judgment of the trial court further identified the nature and frequency of the interviews with the Petitioners:

> "4. The evidence, leads and fruits therefrom acquired on June 18 and 19, 1964. . . . (App., A40)
>
> "5. . . . September 16 and 17, 1964. . . . (App., A44)
>
> "6. . . . September 21, 1964. . . . (App., A44)
>
> "7. . . . [D]uring the twenty-five working days during the period from September 21, 1964, to the end of the year. . . . (App., A44)
>
> . . . December 18, 1964. . . . (App., A45)

"8. . . . [D]uring the period January 1965 through April 1966 consisting of thirty (30) additional working days. . . . (App., A45)"[3]

With (1) primary illegality admitted by the Government and with (2) the trial court concluding that all of the evidence obtained after February 11, 1964 consisted of fruits of this illegality, suppression of all of the evidence was required unless the Government established that it was obtained by means sufficiently distinguishable to be purged of the primary taint.[4] *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963); *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920).

In the instant case the district court concluded:

"4. The plaintiff [Government] has failed to prove that it obtained the evidence it acquired after February 11, 1964 by means of sources which were independent and separate and distinguishable from the unlawful seizures of records and interrogations of the defendants occurring after February 11, 1964. (App., A38)

"5. The plaintiff [Government] has failed to prove that the evidence and the leads to evidence obtained after February 11, 1964 and the fruits thereof were merely duplicative of evidence and leads obtained prior to February 11, 1964." (App., A38)

The decision of the court of appeals does not suggest that the district court's conclusions and the findings in support thereof are erroneous. The opinion simply holds that, because the evidence is to be characterized as *corporate*

3. The interviews with one or both of the Petitioners occurred on the specific dates indicated and during the "working day" periods. (App., A44, 45)

4. The whole purpose of the second evidentiary hearing on the motion to suppress was to develop the chronology of events leading to the acquisition of the evidence. (App., A70) *U. S.* v. *Habig*, 413 F. 2d 1108, 1111 (7th Cir. 1969); cert. den. 396 U. S. 1014.

records[5], the Petitioners had no cognizable constitutional rights to complain as to the manner of the acquisition.

The decision of the court of appeals begs the critical question. The dispositive question does not rest upon the characterization of the evidence as corporate records and leads therefrom. The proper subject of inquiry is the means utilized by the Government to obtain this evidence.[6] The precise subject of concern is the fruit which was obtained through a violation of the Miranda Rule.

The status of Petitioner Habig as a corporate officer and Petitioner Schroering as a corporate employee is irrelevant to the issue. Speaking for the Court in *Curcio* v. *U. S.*, 354 U. S. 118 (1957), Mr. Justice Burton observed.

> ". . . From the fact that the custodian has no privilege with respect to the union books in his possession, the Government reasons that he also has no privilege with respect to questions seeking to ascertain the whereabouts of books and records which have been subpoenaed but not produced. . . . *Id.* at 123
>
> "The Fifth Amendment suggests no such exception. It guarantees that 'no person * * * shall be compelled in any criminal case to be a witness against himself. . . .' A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of

5. The characterization of the evidence as "corporate records" is partially misleading. By way of illustration, the evidence supprесed included information concerning dates and events of a movement of machinery and materials and leads to other evidence therefrom and the fruits thereof (App., A39-40), and the names and addresses of former employees of W. W. Kimball Company and the evidence, leads, and fruits acquired therefrom. App. A40)

6. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Nardone* v. *United States*, 308 U. S. 338 (1939); *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

adequate immunity from prosecution, to condemn himself by his own oral testimony. *Id.* at 123-124

. . .

". . . However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Id.* at 128.

This Court's decision in *U. S.* v. *Kordel*, 397 U. S. 1 (1970) also recognizes that a corporate officer may invoke personal Fifth Amendment rights against self-incrimination with respect to corporate information which is sought from him and which may be used later against him in a criminal prosecution. Speaking for the court, Mr. Justice Stewart observed:

". . . Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own, or because the proceeding in which the Government sought information was civil rather than criminal in character." *Id.* at 7-8.

The fact that the Petitioners in this case produced the records does not cure the unlawful conduct of the Government in utilizing the Petitioners as the vehicle to learn of the existence and whereabouts of the records and other evidence which the Government now proposes to utilize in a criminal prosecution against these Petitioners.[7] Fur-

7. Consistent with *Wilson* v. *U. S.*, 221 U. S. 361 (1911), the Petitioners are not suggesting that they had any privilege to withhold corporate records simply on the grounds that they might be incriminated by the production of the records. However, appropriate independent Fourth Amendment grounds for suppression of the corporate records in this case could exist upon application of the rule of *Mancusi* v. *DeForte*, 392 U. S. 364 (1968).

Furthermore, under the rationale of *Jones* v. *U. S.*, 362 U. S. 257 (1960), it may be suggested that *any person* who turns over or makes accessible corporate records to the Government may in-

thermore, the fact that the existence and whereabouts of the records and other evidence might have been ascertained through other persons and by lawful means cannot purge the taint of the primary illegality of utilizing the Petitioners as the means to discover the existence and whereabouts of the evidence. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 451 (1971).

The first and primary reason for granting the writ is that the judgment of the court of appeals has decided an important question of federal law in a way which conflicts in principle with applicable decisions of this Court, and, to the extent that the applicable decisions of this Court do not decide the precise question involved, it is an important question of federal law which should be decided by this Court.

2.

A Stipulation Must Be Honored and Observed.

Fundamental concepts of due process, justice, and fair play applicable to all judicial proceedings are at issue in this case.

The decision of the court of appeals operated in such a manner as to effectively deny to the Petitioners a fair hearing on their motion to suppress evidence and constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This issue arises with respect to a concession and stipulation by the Government that the Petitioners had standing to move to suppress

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voke Fourth Amendment rights with respect to those records where the Government obtained the records for the express purpose of utilizing them in a criminal prosecution against the person and where the consent to the seizure is vitiated by unlawful conduct on the part of the Government, such as the deceit and misrepresentation practiced upon the Petitioners which the district court found to exist in this case (App., A21, 36-37), a finding deemed irrelevant by the court of appeals. (App., A7-8)

corporate records and certain other evidence. The evidence involved with respect to this question is the same and identical evidence with which the first question is concerned.

The proceedings on the Petitioners' motion to suppress evidence have now been through two evidentiary hearings and two appeals to the Court of Appeals for the Seventh Circuit. At no time has there been any question but that the Petitioners had standing to question the copying and acquisition of corporate records and other evidence. As the Court of Appeals for the Seventh Circuit acknowledged in its first opinion:

> ". . . At the hearing and again at oral argument before this Court, the Government conceded that the Defendants had standing to question the copying of the corporate records. . . ." (App., A67) *U. S.* v. *Habig*, 413 F. 2d 1108, 1109 (7th Cir. 1969)[8]

The propriety of and accord to be given to such a stipulation was recognized by this Court many years ago. Speaking for the court in *H. Hackfield & Company* v. *U. S.*, 197 U. S. 442 (1905), Mr. Justice Day observed:

> ". . . [W]e know no rule of public policy which will prevent the United States attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the government, and not stipulate away the rights of the prosecution." *Id.* at 446.

After the first hearing on the motion to suppress, the posture of this case became quite rigid. As the first opinion

8. As for the reason the Government made the concession in the first place, it is enough to observe that the counsel for the Government who prepared for the first hearing on the motion to suppress were in the best position to appraise the legal consequences of the conduct and actions of the Government agents who acquired this evidence.

of the court of appeals indicates, the cause was remanded to the district court to permit the Government to introduce additional evidence to establish the chronology of events as to the acquisition of the evidence from which the district court was to make a determination of whether the evidence was acquired before or after the focusing of the criminal investigation on the Petitioners. (App., A70) *U. S.* v. *Habig,* 413 F. 2d 1108, 1111 (7th Cir. 1969)

At the time this case was pending before the court of appeals on its first appeal, another appeal involving a similar issue was being considered by the court. The case, *United States* v. *Dickerson,* 413 F. 2d 1111 (7th Cir. 1969), was regarded by the Government as a companion to this case, and the Government conceded that the court's decision in *Dickerson* would be applicable to the instant case. (App. A5, 68-69) *U. S.* v. *Habig,* 413 F. 2d 1108, 1110.

The Government lost in *Dickerson.*

However, on the first appeal of this case which concerned the Government's petition for a rehearing on the motion to suppress, the court of appeals remanded the cause to the trial court:

> ". . . [F]or a further hearing in order to develop the facts necessary to the application of the standards subsequently announced in *Dickerson.*" (App., A70) *Id.* at 1111

Pursuant to this mandate, the district court conducted a further evidentiary hearing and concluded that the evidence obtained by the Government after February 11, 1964, was not obtained by the Government prior to the focusing of the criminal investigation on the Petitioners, and an order of suppression as to this evidence was entered. (App., A11-64)

The judgment of the court of appeals for which this writ is sought resulted from an appeal taken by the Gov-

ernment from this latest order of suppression made by the district court. On this appeal, it was the principal contention of the Government that it improvidently conceded that the rule in *Dickerson* would apply to this case. The Government argued that the principles of *Dickerson* should not apply with respect to corporate records and that the "law of the case" doctrine [the first appeal] should not be permitted to work an allegedly manifest injustice. (App., A5-6)

In its decision, the court of appeals held that the standards of *Dickerson* should not be applied in this case with respect to the corporate records and leads therefrom.[9]

By not applying the standards of the *Dickerson* case to this cause, the court of appeals

1. failed to give effect to the stipulation of the standing of the Petitioners to question the evidence and
2. prejudiced the Petitioners with respect to their hearing rights on a motion to suppress evidence.[10]

The net effect of the decision of the court of appeals in this case is similar to the result in *U. S.* v. *Combs*, 446 F. 2d

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9. The Court of Appeals for the Seventh Circuit held:
"... The question before us here is whether the rule announced in *Dickerson* applies to corporate records and leads obtained.... We hold that it does not." (App., A6)

10. At the first hearing on the motion to suppress, counsel for the Petitioners stated:
"On the question of standing, Your Honor, we take the position it does not require proof because of the admission of the Government in its reply brief on Page 4." (Ct. Ap. App. I, p. 72)

Yet, notwithstanding the above, in the decision of the court of appeals, the review of which is sought by this petition, the court of appeals stated:
"... No claim is made that either Habig or Schroering ever asserted that the corporate records requested by the agents were not possessed by them and that the deception found by the trial court to have been practiced served subsequently to induce their unknowing revelation of the location of absent records. ..." (App., A7)

515 (6th Cir. 1971) where the court of appeals foreclosed consideration of an issue of admissibility of certain evidence by holding the defendant had no standing to raise the question. The issue of standing was not considered by the district court. This court granted certiorari and reversed with directions to remand the cause to the district court for a determination as to standing. *Combs* v. *U. S.*, 408 U. S. 224 (1972). The circumstances in *Combs* most certainly involved a situation justifying the exercise by this Court of its supervisory powers.

The Petitioners in the instant case find themselves in a situation analogous to that which occurred in *Combs*. The manner of the appellate consideration simply demolished and foreclosed the Petitioners' claims which, in this case, were upheld by the district court. However, in contrast to the situation in *Combs*, the basis for the Petitioners' claims in this case was established by stipulation from the inception of the proceedings.

It again must be observed that the posture of this case has been such that there never has been any question as to the standing of the Petitioners to move to suppress the corporate records and other evidence obtained therefrom. The prejudice now worked upon the Petitioners arises from the fact that they relied upon the stipulation of standing and made no effort to bring forth evidence which establish the violation of the Petitioners' personal rights with respect to the acquisition of this evidence.[11]

On the first appeal, the posture of this case was such that the rule to be formulated in *Dickerson* had to apply to this case.[12] The concession of the Government as to the appli-

11. See Footnote 10, *supra*.

12. *U. S.* v. *Dickerson* (App., A72-83), 413 F. 2d 1111 (7th Cir. 1969), involved an individual taxpayer's personal records and statements obtained from the defendant whereas the instant case involves statements and information obtained from the defendants and corporate records and evidence derived from corporate

cation of the standards to be formulated in *Dickerson* was not improvident as the court of appeals found; to the contrary, the agreement that the standards of *Dickerson* applied to this case was a natural and inevitable consequence of the posture of both cases which involved the means by which the evidence was acquired.

As to the original stipulation of standing, there can be no suggestion that it was improper for the Government to make such a stipulation in a criminal case. Stipulations binding both the Government and criminal defendants are not uncommon. *U. S.* v. *Rodriguez*, 241 F. 2d 463 (7th Cir. 1957); *Osborne* v. *U. S.*, 351 F. 2d 111, 120, reh. denied (8th Cir. 1965); *U. S.* v. *Monroe*, 164 F. 2d 471, 476 (2d Cir. 1947) cert. denied, 333 U. S. 828 (1948); *U. S.* v. *Schor*, 418 F. 2d 26, 29 (2d Cir. 1969).

Furthermore, the somewhat oblique approach employed by the Government in an attempt to recant from its stipulation of standing (by suggesting to the court of appeals on the second appeal that it was improvident to concede that *Dickerson* applied to the instant case) came too late. *Osborne* v. *U. S.*, 351 F. 2d 111 (8th Cir. 1965).

This Court's decision in *N. A. A. C. P.* v. *Alabama ex rel. Patterson*, 360 U. S. 240 (1959), reh. den. 361 U. S. 856 (1959), involved an analogous situation where the respondent, after receiving an adverse decision (as the Government in this case did with respect to the *Dickerson* case), attempted to recant from a prior agreement that this court's decision on a single question was dispositive of the whole case. This Court held:

> ". . . This denial comes too late. The State is bound by its previously taken position. . . ." *Id.*, 360 U. S. at 243.

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records. As is noted previously, the characterization of the type of documentary evidence involved is immaterial to the consideration of the application of the Fifth and Sixth Amendments.

Aside from considerations of the law-of-the-case doctrine, (1) the Petitioners' standing to question the copying and acquisition of the corporate documents and other evidence obtained therefrom being stipulated by the Government and (2) the trial court having determined that this evidence was obtained after a criminal investigation focused upon the Petitioners (and there being no complaint by the Government as to this determination), an order of suppression was properly entered.

The injustice worked upon the Petitioners by the failure of the court of appeals to give effect to the stipulation of standing is substantial and material. At this stage of the proceedings, the Petitioners have been effectively denied the opportunity to demonstrate their standing to challenge the legality of the evidence in question.

The materiality of this question concerning the stipulation is, of course, wholly dependent upon the determination of this Court as to the status of the question concerning the application of the fruit-of-the-poisonous-tree doctrine. The Petitioners urge that the record is conclusive to establish the necessary nexus between the admittedly unlawful statements and information obtained from the Petitioners and the corporate evidence discovered and acquired as a consequence of their statements and interviews. The Petitioners respectfully submit that the question of the obligation of the court of appeals to give effect to the Government's stipulation is of sufficient import to justify the exercise of this Court's power of supervision.

CONCLUSION.

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972—September Session, 1972

No. 71-1654

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ARNOLD F. HABIG and JEROME M. SCHROERING,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 66-CR-138

CALE J. HOLDER,
Judge.

Argued September 14, 1972—Decided January 24, 1973

Before SWYGERT, *Chief Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

SWYGERT, *Chief Judge.* This appeal is from an order by the district court suppressing the use of certain evidence in a criminal tax evasion prosecution. The evidence was obtained by Government agents during the preindictment investigation. Entered pursuant to a motion under Fed. R. Crim. P. 41(e), the order followed an evidentiary hearing and was based on findings of fact and conclusions of law made by the district judge. The hearing was conducted

in conformity with the remand ordered by this court in an earlier appeal. *United States* v. *Habig*, 413 F.2d 1108 (7th Cir. 1969).

The issues in this appeal differ materially from those presented when the case was before us initially. The Government now contends that the decision in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969), does not control the disposition of the issues here despite its earlier concession to the contrary. This shift of position requires that we first decide a corollary issue: whether the "law of the case" doctrine precludes our resolution of the main issue. A separate question relates to whether any fourth amendment violations occurred during the Government's investigation which would require suppression of the questioned evidence. It was not necessary for us to reach this last issue in the earlier appeal because we were of the view that an application of the *Dickerson* rule was sufficient to resolve the question.

Briefly, the relevant facts developed at the hearing are as follows. On February 15, 1963 Charles E. Lawrence, an agent of the Internal Revenue Service, was assigned the routine civil audit of a consolidated income tax return filed by the Jasper Corporation for the year ending June 30, 1961. The consolidated return covered eleven corporations, ten of them subsidiaries of the Jasper company.[1] The agent was also assigned the civil audit of the separate tax returns of three of the subsidiary companies for the year ending June 30, 1960. During its progress, the audit was expanded to include other fiscal years.

On the recommendation of a firm of independent certified public accountants which had prepared the returns, Seid-

[1] The ten subsidiaries were: The Borden Cabinet Company; Evansville Veneer & Lumber Company; Cabinet Manufacturing Corporation; Jasper American Manufacturing Company; Jasper Style Masters, Inc.; S. S. & S. Manufacturing Company; Lafayette Manufacturing Company; W. W. Kimball Company; Kimball Piano, Inc.; and Habig Manufacturing, Inc.

man & Seidman, the agent in February 1963 visited Jerome M. Schroering, the comptroller of the Jasper company and each of its subsidiaries. After identifying himself and stating his assignment, Lawrence secured Schroering's cooperation for an examination of the records of Jasper and its subsidiaries at their respective offices.

Lawrence spent from March to July of 1963 examining the records of Jasper and four subsidiary companies. As a result of his examination, Lawrence discovered certain discrepancies which led to his belief that a tax fraud had been perpetrated through records of fictitious intercompany sales of lumber. Lawrence thereupon submitted a referral report "for potential fraud cases" to his group supervisor, and at the end of March, 1964 the case was accepted by the Intelligence Division of the Internal Revenue Service for a full-scale investigation. Special Agent Russell C. Hicks was assigned to conduct the investigation with the aid of agent Lawrence. The district judge found that the investigation "from its inception was upon Arnold F. Habig and Jerome M. Schroering." Habig was the largest single stockholder of the corporations and their chief executive officer. After Hicks' assignment, Lawrence at Hicks' direction obtained and examined numerous corporate records. On September 21, 1964 Hicks and Lawrence met by appointment with Schroering at the Jasper corporation offices. Hicks, upon being introduced to Schroering, stated: "I am a Special Agent with the Intelligence Division; Mr. Kelly [of Seidman] knows what my job is. I am here to determine if there is [sic] any criminal aspects involved in the case." Hicks then requested and received permission from Schroering to examine additional books and records of the corporations, which the agents subsequently spent considerable time examining. They also copied some of the documents being examined.

The investigation continued into 1965, when Hicks requested that Schroering provide him with additional documents. Schroering complied, and had the assembled records delivered to the offices of the Evansville company where Hicks and Lawrence examined them. During September 1965 the two agents met with Schroering and Habig in the offices of the Intelligence Division of the IRS. At the meeting, which was Habig's first personal contact with either of the agents, both Habig and Schroering were interrogated regarding the affairs under investigation. The district court found that no warnings of constitutional rights were given nor was either defendant advised that he was the subject of a criminal investigation. Subsequently, between November 1965 and February 1966, the agents copied numerous documents and records of the corporations. The district court found that this copying was undertaken in a secretive manner and without the consent of either Schroering or Habig. In August an indictment was returned against these two defendants.

The district judge found that the agents had acted improperly in their conduct of the investigation after January, 1964:

> The plaintiff's agents after February 11, 1964 had the duty upon the first contact with defendants to advise them of their constitutional rights and advise them that they were the subject of a criminal investigation. The statements, information and leads to evidence obtained by the plaintiff's agents from the defendants after February 11, 1964 were illegally obtained by reason of the failure of the plaintiff's agents to fulfill such duty as the criminal investigation was focused on the two (2) defendants from and after February 11, 1964.

Moreover, the district judge inferred "that the corporations and the defendants would not have consented to the criminal investigation had they known of the deceit practiced by plaintiff's agents prior to September 21, 1964," in

failing to warn the defendants of the changed nature of the ongoing investigation.

I

The "law of the case" doctrine comes typically to bear when an appellate court has before it for a second time a controversy in which it has previously made a ruling of law. Strictly applied, the doctrine serves to bar an attack on the prior ruling by either party to the suit, much like the doctrine of res judicata. This court, however, has not adhered to a rigid application of the doctrine. Many years ago, Judge Evans wrote:

> [T]he view that appeals to us, and which we adopt, merely recognizes the law of the case as one of public policy and private peace, and one to be followed generally, and departed from rarely. It is, however, not an inexorable rule, and should not be applied where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case. *Luminous Unit Co.* v. *Freeman-Sweet Co.*, 3 F.2d 577, 580 (7th Cir. 1924).

See also *Kaku Nagano* v. *Brownell*, 212 F.2d 262 (7th Cir. 1954); *Bowles* v. *Good Luck Glove Co.*, 150 F.2d 853 (7th Cir.), *cert. denied*, 326 U.S. 794 (1945); *LeBold* v. *Inland Steel Co.*, 136 F.2d 876 (7th Cir.), *cert. denied*, 320 U.S. 787 (1943). This view is peculiarly appropriate here. The Government in the first appeal conceded that the rule we would fashion in *Dickerson* should apply to the instant prosecution. The concession was improvident and led us to imply that the rule announced in *Dickerson* controlled this case. As we shall demonstrate, that implication was erroneous.

II

In *Dickerson* we held that "*Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." 413 F.2d at 1117. The question before us here is whether the rule announced in *Dickerson* applies to corporate records and leads obtained by internal revenue agents for use as evidence in a criminal prosecution.[2] We hold that it does not.

It is well established that a corporate officer or other custodian of corporate books has no constitutional right to refuse production of corporate records in response to a lawful request therefor even though the records may incriminate him personally. *Wilson* v. *United States,* 221 U.S. 361 (1911). A corporation must submit its books and records whenever properly required to do so, and, since the privilege against self-incrimination is a purely personal one, it cannot be utilized on behalf of a corporation. *United States* v. *White,* 322 U.S. 694, 699 (1944). It necessarily follows that a corporate officer, even though he is a prospective criminal defendant, is not entitled to *Miranda*[3] warnings when requested to produce corporate records. In such a situation *Dickerson* does not apply.

In support of their position, the defendants rely on *Curcio* v. *United States,* 354 U.S. 118 (1957). That case held that a custodian of a union's books cannot be compelled by contempt order to reveal the whereabouts of the books after he had testified that his refusal to produce

[2] The Government concedes that *Dickerson* serves to bar the admission into evidence of all oral statements made by Schroering and Habig after Hicks came into the case. We do not, therefore, modify that portion of the district court order suppressing oral statements.

[3] *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

the books was based on the fact that he did not then possess them. The case is inapposite here. No claim is made that either Habig or Schroering ever asserted that the corporate records requested by the agents were not possessed by them and that the deception found by the trial court to have been practiced served subsequently to induce their unknowing revelation of the location of absent records. Indeed, the fact that all the records requested by the agents were produced leaves the defendants no room to argue that the situation here falls within the ambit of *Curcio*.

III

The defendants contend that the fourth amendment rights of their corporations were violated because they, as corporate officers, were not given *Miranda*-type warnings required under the fourth amendment to assure a knowing and intelligent consent to search. We reject this contention. This court only recently held that warnings required by the fifth and sixth amendments under *Miranda* are not *sine qua non* to a valid waiver of fourth amendment rights. *United States* v. *Young* (No. 71-1589, Oct. 25, 1972). In that case the defendant had invited police officers into his home and invited them to "look around." They found and seized incriminating evidence in the personal possession of the defendant. We held that the fourth amendment required no *Miranda*-type warnings in advance of the search in that situation; *a fortiori,* no such warnings need be given to custodians of corporate records during a criminal tax investigation.

IV

The district judge held that "deceit" had been practiced by agents Lawrence and Hicks prior to September 21, 1964; on that date Hicks informed Schroering that he

was a Special Agent of the Intelligence Division and that a criminal investigation was underway. The deceit referred to by the judge encompassed the period from March 27, 1964, when the Intelligence Division started a full-scale criminal investigation, to the September 21 meeting. The judge found that neither defendant was aware during that period that a criminal investigation was then in progress or that Hicks had been assigned as a Special Agent to conduct the investigation. He further found that the true nature of the investigation was actively concealed from the defendants and all other connected with Jasper and its subsidiaries: "Mr. Hicks . . . remained submerged from the view of the taxpayers and secretly conducted the search for evidence of crime through the facade of Mr. Lawrence who was accepted and known to everyone as the civil agent of the Internal Revenue Service." Finally, the judge found that the corporate records assembled by Schroering for the agents' inspection in a private room of the Evansville Veneer & Lumber Company offices were photocopied by the agents "behind closed doors without the permission or authorization or knowledge of anyone, including the defendants." The last finding has no relevance to the issue before us. The undisputed fact is that these records were assembled and made available to the agents at the direction of Schroering for the acknowledged purpose of inspection. Whether they merely looked at the records or copied them, even clandestinely, is beside the point.

It is not to be gainsaid, nonetheless, that corporations do have rights under the fourth amendment that may be asserted under certain circumstances. In a Clayton Act civil prosecution, this court held in *Knoll Associates* v. *FTC*, 397 F.2d 530 (7th Cir. 1968), that the theft of corporate documents which were turned over to the Government for its use constituted an unreasonable search and seizure

within the meaning of the fourth amendment and that the corporate defendant was entitled to invoke this constitutional protection. Similarly, corporate officers may have fourth amendment rights with respect to corporate records. In *Mancusi* v. *DeForte,* 392 U.S. 364 (1957), a union officer was protected from a warrantless search of a union office (jointly shared by the officer) from which union records were seized. Also see *United States* v. *Rosenberg,* 416 F.2d 680 (7th Cir. 1969).

In the case before us there was no theft of corporate records nor any other form of trespass on corporate property. The fact that a criminal investigation had been started was concealed from the defendants for a period of time did not make involuntary the otherwise voluntary consent of Schroering to inspection of the corporate records. Schroering was aware of Lawrence's identity as an Internal Revenue agent, and Schroering had no constitutional privilege to refuse the production of corporate records when Lawrence so requested, provided the records requested were relevant to tax matters under investigation. It was his duty to make the records available regardless of whether the investigation had shifted from a civil to a criminal emphasis or whether he might himself be incriminated. *Wilson* v. *United States, supra;* see *Curcio* v. *United States supra; United States* v. *Sclafani,* 265 F.2d 408 415 (2d Cir.), *cert. denied,* 360 U.S. 918 (1959). The same is true with respect to Habig. It is irrelevant that no summons, subpoena, or search warrant was used. If production of the records had been refused, the agents could have obtained them by summons under 26 U.S.C. §§ 7602, 7604. The fact that the agents did not resort to this measure does not mitigate against the consensual production of the records. *Green* v. *United States,* 296 F. 2d 841, 843 (2d Cir. 1961).

The order of suppression is vacated insofar as that order covered the corporate records of Jasper and its subsidiaries and any leads which the Government agents obtained from those records during their investigation. In all other respects the order is affirmed, and the case is remanded for trial.

APPENDIX B

UNITED STATES DISTRICT COURT

Southern District of Indiana

Indianapolis Division

UNITED STATES OF AMERICA

vs.

ARNOLD F. HABIG
JEROME M. SCHROERING

No. IP 66-Cr-138

ENTRY OF RULING ON DEFENDANTS' AUGUST 27, 1968 MOTION TO SUPPRESS EVIDENCE

The indictment in seven (7) counts was returned in this case on August 12, 1966. The defendants were arraigned on October 28, 1966 and entered their pleas of not guilty.

On October 28, 1966, the defendants filed their motions to dismiss counts four (4) and six (6) concerning a statute of limitations question. After a December 7, 1966 hearing, the motions to dismiss such counts were on January 23, 1967 sustained in a published opinion of July 17, 1967 on authority of a previous 1963 published opinion of Chief Judge Steckler of this district. See memorandum opinion, *United States of America* v. *Arnold F. Habig, Jerome M. Schroering,* 270 F.Supp. 929. The United State of America appealed from this ruling. It was reversed on March 5, 1968. *United States of America* v. *Arnold Habig, et al.,* 390 U.S. 222, 88 S.Ct. 926, 19 L.Ed.2d 1061.

The defendants thereafter on August 27, 1968 filed their motion to suppress evidence. It was sustained on November

19, 1968 after an evidentiary hearing on November 1, 1968. The United States of America filed a motion for rehearing which was denied on December 12, 1968. The United States of America appealed from such ruling and the case was remanded on July 28, 1969 "for a further hearing in order to develop the facts necessary to the application of the standards subsequently announced in Dickerson." *United States of America* v. *Arnold F. Habig and Jerome M. Schroering* (7 CA 1969), 413 F.2d 1108 and see *United States of America* v. *Dickerson* (7 CA 1969), 413 F.2d 1111. Thereafter and following receipt of such mandate on February 23, 1970, discovery proceedings were undertaken. On March 13, 1970 a further evidentiary hearing was order for May 7, 1970 upon the issues of the defendants' August 27, 1968 motion to suppress. Upon request, the hearing date was vacated after negotiations with busy counsel for the United States of America and defendants, the hearing date was rescheduled for and was conducted on December 10, 1970. Post hearing briefs were filed on March 4, 1971.

The Court being advised in the matters does now submit its Findings of Facts and Conclusions of Law based upon the evidence of the two (2) evidentiary hearings of November 1, 1968 and December 10, 1970.

FINDINGS OF FACTS

1. On February 15, 1963, and at all times in question, Charles E. Lawrence was an Internal Revenue Agent of the United States of America. He was then assigned the consolidated income tax return of the Jasper Corporation for the fiscal year ending June 30, 1961, for the purpose of conducting a routine civil audit. The consolidated return consisted of the following corporations:

The Jasper Corporation;
The Borden Cabinet Company;

Evansville Veneeer & Lumber Company;
Cabinet Manufacturing Corporation;
Jasper American Manufacturing Company;
Jasper Style Masters, Inc.;
S. S. & S. Manufacturing Company;
Lafayette Manufacturing Company (formerly Gordonsville Manufacturing Company);
W. W. Kimball Company;
Kimball Piano, Inc.; and
Habig Manufacturing, Inc.

He was then also assigned for the purpose of conducting a routine civil audit of the separate tax returns for the fiscal year ending June 30, 1960 of Jasper Corporation; Lafayette Manufacturing Company; Evansville Veneer & Lumber Company; and Jasper Style Masters, Inc.

2. Mr. Lawrence proceeded to conduct such audit and as it progressed the audit was expanded to include other years. The Borden Cabinet Company's tax return for the fiscal year ending June 30, 1960 was assigned to him on March 20, 1963. The W. W. Kimball Company's tax returns for the fiscal years ending February 29, 1960 and June 30, 1960 were assigned to him on April 4, 1963; and the Gordonsville Manufacturing Company's tax return for the fiscal year ending February 29, 1960 was assigned to him on July 10, 1963.

3. During the year 1963, Arnold F. Habig was Chairman of the Board of Directors of the Jasper Corporation and each of its said subsidiaries (prior thereto he had been President), and Jerome M. Schroering was the Comptroller of the Jasper Corporation and each of its said subsidiaries.

4. The tax returns for the various corporations for the years in question were prepared by Seidman & Seidman, a firm of independent certified public accountants. Sometime between February 15, 1963 and February 26, 1963, Mr.

Lawrence contacted Mr. Robert Kelly, a C. P. A. of the firm of Seidman & Seidman to determine whom he should contact in the various corporations with respect to his audit. Mr. Kelly referred Mr. Lawrence to the defendant, Jerome M. Schroering.

On February 27, 1963, Mr Lawrence visited the office of Mr. Schroering at 15th and Cherry Streets, Jasper, Indiana. He identified himself and informed Mr. Schroering that he had the Jasper Corporation consolidated return for the fiscal year ending June 30, 1961, and related return for examination. Mr. Lawrence also indicated that it would be necessary for him to see the retained copies of the tax returns, the minute books of the corporation, and the other books and records of the various corporations as needed, to complete his examination. Mr. Schroering informed Mr. Lawrence that the books and records of the various corporations contained the current years' operations and that it would be necessary to examine the books at the offices of each corporation involved. Arrangements were made to visit Mr. Schroering's office the next day.

5. On February 28, 1963, March 4, 1963, and March 5, 1963, Mr. Lawrence visited the office of Mr. Schroering, examined the minute books of the various corporations, and inspected copies of prior years' tax returns.

From March 13, 1963, to March 28, 1963, Mr. Lawrence examined the books and records of the Jasper Corporation for its fiscal years 1960 through 1962 at its office in Jasper, Indiana. A Mr. Lappe and Mr. Schroering made the books and records available to Mr. Lawrence for purposes of the examination.

On April 12, 1963, Mr. Lawrence began the examination of the books and records of Evansville Veneer & Lumber Company for its taxable years 1960 through 1962 at its office in Evansville, Indiana. Mr. Lawrence continued the

examination on April 15, 17 and 22 through 26 of 1963. Mr. Roman Oser and Mr. Schroering made the books and records available to Mr. Lawrence for purposes of the examination. On April 26, 1963, Mr. Schroering voluntarily gave Mr. Lawrence copies of the twelve (12) W. W. Kimball Company invoices reflecting sales to Evansville Veneer & Lumber Company which are as follows:

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

Invoices of W. W. Kimball reflecting sales to Evansville Veneer & Lumber Company, as follows:

Order No.	Date Entered	Total Amount
21184	2/8/60	$ 1,525.29
22208	2/29/60	29,939.47
22209	2/29/60	36,057.25
22212	2/29/60	15,038.02
22215	2/29/60	15,229.56
22218	2/29/60	9,203.87
22221	2/29/60	16,787.22
22967	2/29/60	16,756.38
22346	3/7/60	415.20
25792	6/30/60	30,403.98
25793	6/30/60	23,129.35
25794	6/30/60	11,024.28

Mr. Lawrence examined the books and records of the Jasper Corporation's Machinery and Equipment Division on April 18 and 19 of 1963. A Mrs. Ringer made the books and records available to him for purposes of the examination.

From June 18 through June 20, 1963, Mr. Lawrence examined the books and records of Gordonsville Manufacturing Company (later renamed Lafayette Manufacturing Company) for its fiscal years ending February 29, 1960 and June 30, 1960, at its office in Lafayette, Tennessee. William Beasley made the books and records available to Mr. Lawrence for purposes of the examination.

Mr. Lawrence continued his examination of the various corporations on July 8 through July 10, 1963, by examining the books and records of the Borden Cabinet Corporation for its fiscal years 1960, 1961, and 1962 at its office in Borden, Indiana. Mrs. Evelyn Miller made the books and records available to Mr. Lawrence for purposes of the examination.

On July 12 and from July 15 through July 17 of 1963, Mr. Lawrence examined the books and records of W. W. Kimball Company for its fiscal years ending February 29, 1960, June 30, 1960, June 30, 1961, and June 30, 1962, at the Kimball Music Center in Jasper, Indiana. The books and records were made available to Mr. Lawrence by Mr. Schroering.

Mr. Lawrence went back to the Jasper Corporation to continue his examination of its books and records on July 19, 1963, in an effort to determine if sales of lumber and veneer had been made by W. W. Kimball Company to Jasper. Mr. Lawrence also continued his examination of Kimball's books for this purpose. Mr. Lawrence continued this activity on July 24 and 25, and from August 6 through August 8 of 1963. The books and records were made available to Mr. Lawrence by Mr. Schroering.

On September 9, 10, 11 and 12 of 1963, Mr. Lawrence met with Mr. Schroering at the Kimball Music Center in Jasper, Indiana, where they attempted to match up various bills of lading and receiving data with invoices. At one of these meetings (September 12, 1963), Mr. Schroering gave Mr. Lawrence copies of seventeen (17) invoices.

Sometime in 1963, Arnold F. Habig, who until 1963 was President, and in 1963 became Chairman of the Board of Directors of each of the corporations in issue, first learned, through a conversation with Mr. Schroering, that the civil tax examination of the corporations was being made by Revenue Agent Charles E. Lawrence.

6. Mr. Lawrence's examination of the various corporations disclosed that W. W. Kimball Company had issued certain invoices reflecting the sale of substantial quantities of lumber and veneer to the Jasper Corporation; Evansville Veneer & Lumber Company; Borden Cabinet Corporation; and Gordonsville Manufacturing, Inc. However, none of these corporations had received reports or bills of lading indicating the lumber and veneer had actually been transferred. Mr. Lawrence made repeated requests of Mr. Schroering, some of his subordinates, and later Mr. Kelly to produce underlying documents in support of certain questioned invoices.

Following his complete and comprehensive examination of the books and records of various corporations, Mr. Lawrence had a series of meetings with Robert Kelly, of Seidman & Seidman, in an effort to secure documentation that the lumber and veneer reflected on the questioned invoices had been transferred from Kimball to the other corporations. These meetings took place at the office of Seidman & Seidman in Evansville, Indiana, on November 5, 1963, November 13, 1963, December 12, 1963, December 17, 1963, and January 7, 1964. At the meeting on November 13, 1963, Mr. Lawrence requested Mr. Kelly to furnish him with a power of attorney authorizing the firm of Seidman & Seidman to represent the various corporations during the investigation, since he felt future conferences would be necessary.

Mr. Lawrence suspected that the tax returns being examined by him might be fraudulent and thought that a fraud case could result on and prior to September 12, 1963 and continuously thereafter until his civil audit was terminated on January 11, 1964. Mr. Lawrence, after formulating such suspicion of fraud, did not follow Internal Revenue Service practices of suspending his activities and submitting a referral report to his superiors but elected to

personally satisfy his suspicions further by acquiring the said copies of the invoices, making the repetitive requests for documentation of the transactions in such invoices, and securing quotable responses thereto of those persons connected with the corporations.

7. In conducting such examination, Mr. Lawrence prepared work sheets which were incomplete. Upon completion of such examination he also possessed the twelve (12) copies of W. W. Kimball Company invoices referred to herein in finding number 5 and in addition the following copies of invoices furnished him by Mr. Schroering during the course of the examination:

(A) Records of the Jasper Corporation. Invoices of W. W. Kimball Company reflecting sales to Jasper Corporation as follows:

Order No.	Date Entered	Total Amount
21480	1/ 8/60	$14,887.99
22213	2/29/60	67,803.15
22216	2/29/60	7,266.86
22220	2/29/60	5,040.00
22223	6/30	3,834.60
None Shown	6/30	10,040.34
None Shown	6/30	10,032.00

(B) Records of Borden Cabinet Corporation. Invoices of W. W. Kimball Company reflecting sales to Borden Cabinet Corporation as follows:

Order No.	Date Entered	Total Amount
22211	2/29/60	$50,018.40
25791	6/30/60	25,176.00

(C) Records of Lafayette Manufacturing Company (formerly known as Gordonsville Manufacturing Company). Invoices of W. W. Kimball Company reflecting sales to Lafayette Manufacturing Company as follows:

Order No.	Date Entered	Total Amount
22202	2/29/60	$ 8,693.75
22203	2/29/60	7,832.00
22205	2/29/60	6,371.50
22206	2/29/60	13,317.00
22207	2/29/60	13,490.63
25795	6/30/60	14,291.31
25796	6/30/60	13,850.98
25797	6/30/60	15,367.21

Mr. Lawrence had not obtained during the civil audit any copies of any other books and records of the corporations examined.

On February 11, 1964, Mr. Lawrence terminated his examination and submitted a referral report for potential fraud cases to his group supervisor, Robert A. Fink. Mr. Fink signed the report on February 13, 1964, and Osborne E. Dickson, Chief, Audit Division, referred the case to the Intelligence Division on February 18, 1964. The referral report was prepared by Mr. Lawrence from such incomplete work sheets, invoices and his memory of pertinent facts acquired and retained by him in such examination. Such referral report was introduced in the last hearing as plaintiff's Exhibits 104B and 129 (also defendants' Exhibit AG) consisting of two (2) pages of U. S. Treasury Department—Internal Revenue Service Form 2797 (rev. 3-62) and an expanded typewritten report pages numbered two (2) through eight (8) and a two (2) page Exhibit "A" attached hereto. The referral report is attached thereto and made a part hereof.

On March 27, 1964, after a preliminary investigation, the case was accepted by the Intelligence Division for full-scale investigation and assigned to Special Agent Russell C. Hicks. Mr. Lawrence was reassigned to the case as cooperating officer to assist Mr. Hicks. The function of the Intelligence Division of the Internal Revenue Service in this investigation was limited to a criminal investigation. The acceptance by the Intelligence Division of the Internal Revenue Service constituted a determination by that Division that all evidence pertinent to a possible cirminal violation had to be gathered. The full-scale investigation was to provide for conducting an investigation in order to obtain evidence, or leads to evidence, for use in supporting a charge of criminal tax violations and presenting such criminal charge for purposes of obtaining a conviction.

8. The investigation by Mr. Hicks and Mr. Lawrence from its inception was upon Arnold F. Habig and Jerome M. Schroering. Mr. Habig was the largest single stockholder and had control of the corporations. Mr. Habig was the chief executive officer of the corporations whose income tax returns were being investigated. Mr. Jerome M. Schroering was the chief accounting officer of those corporations. Mr. Lawrence said in his referral report that Mr. Schroering made the questioned corporate entries and that Mr. Habig controlled the corporations. The referral report referred to in item 7 of these findings also supports this finding. During the course of the two (2) year criminal investigation the plaintiff made out case assignment and time cards in the names of the five (5) corporations and the two (2) defendants. They were prepared for plaintiff's internal use. The omission or failure to prepare a card for Mr. Schroering until March 15, 1966 is immaterial to the finding above.

9. Pertinent to the issues of the motion to suppress there were four (4) stages of the Intelligence Division's

criminal investigation. The first stage being that period of March 27, 1964 to September 21, 1964. The second stage being the day of September 21, 1964. The third stage being the period of September 22, 1964 through December 1964. The fourth stage being the period of January 1965 through April 28, 1966.

9(A). First Stage of Criminal Investigation.

During this stage the defendants and none of the officers, directors, stockholders, or employees of the corporations were informed directly or indirectly that a criminal investigation was being conducted by the United States of America with respect to Mr. Habig or Mr. Schroering. The plaintiff conducted such investigation during this stage so as to deceive the defendants and the officers, directors, stockholders, or employees of the corporations so as to prevent the disclosure that there was a criminal investigation. The plaintiff's conduct in the investigation during this stage was not only that of not informing anyone of the true nature of the investigation but its agents did actually, actively and affirmatively make false representation as to the true purpose of the investigation.

For the entire six months or first stage of the investigation the Special Criminal Investigator, Mr. Hicks, remained submerged from the view of the taxpayers and secretly conducted the search for evidence of crime through the facade of Mr. Lawrence who was accepted and known to everyone as the civil agent of the Internal Revenue Service. Mr. Hicks first surfaced to the view of the taxpayers on September 21, 1964. Mr. Hicks was first made known to an employee of one (1) of the corporations on September 17, 1964 when he and Mr. Lawrence visited an office to copy records of one (1) of the outlying corporations at Borden, Indiana (Mr. Lawrence had alone visited such office the preceding day on September 16, 1964). Both Mr.

Lawrence and Mr. Hicks failed to inform the employees of the corporation they were criminal investigators. They signed the corporation's visitor registration log as follows:

"Charles E. Lawrence, IRS, to see Mr. Rexroat."

"Russell C. Hicks, I. R. Service, to see Mr. Rexroat." Mr. Hicks did not accompany Mr. Lawrence on the first day, September 16, 1964, it was explained by Mr. Lawrence in this hearing, because Mr. Hicks was scheduled to have eight (8) hours of firearms training on that date. However, Mr. Hicks drove Mr. Lawrence to Borden, Indiana, and instructed him to examine books and records and to obtain the addresses of certain employees of Borden Cabinet Corporation. Mr. Lawrence did not inform the employees of Borden Cabinet Corporation that Mr. Hicks was criminally investigating the case on this September 16, 1964 trip. Mr. Lawrence failed to inform any of such employees of the Borden Cabinet Corporation on September 16, 1964 that he was a criminal investigator.

On April 18, 1964 and on other occasions, such as July 13, 1964, Mr. Lawrence as a civil agent with prior clearance of Mr. Hicks, which clearance was unknown to the taxpayers, requested and secured from the taxpayers extensions of the time for the assessment of any taxes. The written request of Mr. Lawrence reads as follows with emphasis added by the Court:

"• • •

Your Federal tax return for the year shown above is being considered by this office. Please note that the statutory period of limitations for the assessment of any tax which may be found due on this return will expire in the near future. *It is evident that sufficient time does not remain within the statutory period to permit a thorough and mutually satisfactory audit.*

In order that you and the Internal Revenue Service may have sufficient time to consider fully any ques-

tions or issues which may arise during the examination, please sign all copies of the enclosed consent form in accordance with the instructions shown on the bottom of that form. All three copies should then be returned in the enclosed self-addressed envelope to this office within ten (10) days from the date of this letter. Upon acceptance of the properly signed consent, one completed copy will be returned to you for your files.

Very truly yours,

CHARLES E. LAWRENCE
Internal Revenue Agent"

In each instance Mr. Schroering, as Comptroller of the corporations, received the requests and executed the consents.

On May 20 and 21, 1964, Mr. Hicks and Mr. Lawrence conferred with each other concerning the fraud investigation.

On May 26, 1964, Mr. Lawrence visited the offices of the taxpayers' accounting firm at Mr. Hicks' direction to obtain an affidavit filed by the Jasper Corporation in a legal action in the United States District Court of a labor union against W. W. Kimball Company. Mr. Lawrence obtained from a Mr. Kelly of that firm a copy of a memorandum brief and such affidavit. The action involved the removal of the machinery and facilities of the W. W. Kimball plant from the Chicago, Illinois, plant. Mr. Hicks sought to acquire further information as to dates and events concerning the movement of machinery and materials from Illinois to Indiana. Mr. Lawrence did not disclose to the taxpayers or anyone that he was conducting a criminal investigation for Mr. Hicks.

On May 27, 1964, Mr. Hicks and Mr. Lawrence again conferred concerning the additional information acquired by Mr. Lawrence from the taxpayers' accountants on May 26, 1967. The names of former employees of W. W. Kimball Company were discussed by them. They also discussed

plans for Mr. Lawrence to look at the payroll records of W. W. Kimball Company for the names and addresses of such former employees so that they could be interviewed.

On June 5, 1964, Mr. Lawrence at the request of Mr. Hicks went to the offices of W. W. Kimball Company in Jasper, Indiana, to obtain the names and addresses of former employees of that company. Mr. Schroering was requested to and did furnish payroll records, retained copies of Forms W-2 and the Employer's Quarterly Federal Tax Returns (Form 941). Mr. Lawrence secured from these records the names and addresses of former employees of W. W. Kimball Company who resided in the vicinity of the cities of Melrose Park and Chicago, in the State of Illinois, to be used as contacts for the purpose of developing further evidence and leads. Mr. Lawrence did not disclose to the taxpayers or anyone that he was conducting a criminal investigation for Mr. Hicks.

On June 15, 16 and 17, 1964, Mr. Hicks accompanied by Mr. Lawrence traveled to Illinois and returned. While in Illinois, they called on and interviewed certain former employees whose names and addresses were obtained from the records of W. W. Kimball Company by Mr. Lawrence in the first stage of the criminal investigation. They made memoranda notes of the interviews and obtained one (1) signed statement.

On June 18 and 19, 1964, Mr. Lawrence at the request of Mr. Hicks went to Mr. Schroering at the Jasper Corporation Offices in Jasper, Indiana. He requested and obtained certain books and records of the Jasper Corporation and its subsidiaries from which he extracted information to complete the work sheet schedule of invoices which he had begun prior to criminal investigation pertaining to intercompany sales of lumber and veneer. Mr. Lawrence also examined such books and records in an attempt to reconcile the deductions per book with invoices of intercom-

pany sales of lumber and veneer. It was not until the criminal investigation that Mr. Lawrence deemed it necessary to complete that schedule and such necessity was determined by Mr. Hicks. Mr. Lawrence did not disclose to the taxpayers or anyone that he was conducting a criminal investigation for Mr. Hicks. The schedule of invoices and records attached thereto obtained in these dates is as follows:

RECORDS OF THE JASPER CORPORATION.

Invoices of W. W. Kimball Company reflecting sales to Jasper Corporation, as follows:

Order No.	Date Entered	Total Amount
21649	6/29/60	$1,827.69
22065	2/29/60	160.00
22214	2/29/60	524.34
22217	2/29/60	1,786.85
22988	10/3/59	1,986.08
22989	10/6/59	1,717.73
22990	11/20/59	81.98
22991	2/29/60	2,244.24
22992	2/ 4/60	204.32
22993	12/17/59	646.02
22994	12/17/59	57.82
22997	2/ 3/60	1,482.29
23003	2/27/60	873.96
23004	2/27/60	524.18
23005	2/27/60	226.82
23006	12/ 2/59	596.93
23011	11/10/59	98.27
23013	11/10/59	291.27
22224	4/ 7/60	16.56
22237	3/ 3/60	1,079.70
22240	3/ 4/60	624.00
22241	3/ 4/60	30.80
22242	3/ 4/60	1,204.37
22243	3/ 4/60	75.04
22244	3/ 4/60	25.80
22245	3/ 4/60	235.48

Order No.	Date Entered	Total Amount
22248	3/ 4/60	$ 411.80
22249	3/ 4/60	90.12
22344	3/ 7/60	2,686.81
22453	3/14/60	3.28
22456	3/14/60	12.10
22458	3/14/60	14.62
22459	3/14/60	501.01
22484	3/14/60	801.80
22485	3/14/60	450.32
22585	3/25/60	16.10
22608	3/25/60	24.00
22609	3/25/60	134.66
22610	3/25/60	17.16
22656	4/ 4/60	754.00
22657	4/ 4/60	34.26
22659	4/ 4/60	144.99
22697	4/11/60	286.50
22698	4/11/60	41.88
22699	4/11/60	100.00
22700	4/11/60	102.90
22720	4/19/60	129.92
22721	4/19/60	24.80
22723	4/19/60	492.29
22754	4/21/60	134.21
22756	4/21/60	13.62
22757	4/22/60	263.88
22822	5/13/60	139.72
22823	5/13/60	900.45
22824	5/13/60	34.72
22858	4/26/60	65.20
22859	4/26/60	2,561.00
22866	4/27/60	650.00
22892	4/28/60	266.88
22929	5/ 5/60	1,136.25
22933	5/ 5/60	80.76
22937	5/ 6/60	58.74
22955	5/18/60	4,010.03
22961	5/18/60	622.07
23020	5/20/60	1,407.81
23056	5/23/60	221.30

Order No.	Date Entered	Total Amount
23081	5/26/60	$1,698.27
23126	5/31/60	3,361.51
23139	6/ 2/60	640.00
23190	6/ 7/60	1,031.25
23196	6/10/60	420.90
23222	6/13/60	75.24
23881	6/30/60	5,338.98

Partial—Bill of Lading No. 37048 attached to Order No. 21649; Bill of Lading attached to Order Nos. 22214, 22217, 22988 through 22994, 23003, 23006, 23011, 23013, 22224, 22240, 22242, 22245, 22344, 22458, 22459, 22484, 22697, 22700, 22723, 22754, 22756, 22822, 22824, 22933, 22937, 22955, 23020, 23056, 23081, 23126, 23139, 23190, 23196, 23222, 23881.

Receiving record or receiving report No. 8196 attached to Order No. 21649; Receiving record or receiving report No. 09384 attached to Order No. 22065; Receiving record or receiving report attached to Order Nos. 22214, 22216, 22217, 22989 through 22994, 23003, 23005, 23006, 23011, 23013.

Memorandum attached to Order Nos. 22213, 22216, 22988, 22989, 22997, 23003, 23004, 22237, 22248, 22249, 22929, 22961, 23020, 23056, 23081, 23126, 23139, 23881.

RECORDS OF LAFAYETTE MANUFACTURING COMPANY (formerly known as GORDONSVILLE MANUFACTURING COMPANY)

Invoices of W. W. Kimball Company reflecting sales to Gordonsville Manufacturing Company, as follows:

Order No.	Date Entered	Total Amount
21536	2/15/60	$ 185.66
22045	2/27/60	95.26
22204	2/29/60	928.20
22976	9/23/59	3,982.00
22977	9/29/60	1,880.00
22979	10/ 6/59	1,716.35
22980	10/12/59	350.00
22984	10/26/59	775.00
22981	10/14/59	173.84
22985	11/ 9/59	250.00
22987	11/20/59	73.00
23000	1/27/60	833.34
23007	2/ 2/60	382.42
23010	2/27/60	244.26
22482	3/14/60	145.60
22517	3/18/60	204.32
25798	6/30/60	433.67
25799	6/30/60	539.92
25800	6/30/60	239.17

Partial—Bill of Ladings attached to Order Nos. 21536, 22045, 22202 through 22205, 22207, 22976, 22977, 22979, 22980, 22984, 22981, 22985, 22987, 23000, 23010, 22452, 22517.

Receiving record or receiving report attached to Order Nos. 22202, 22203, 22205, 22207, 22977, 22979, 22980, 22984, 22981.

Memorandum attached to Order Nos. 22045, 22985, 23000, 23007, 23010, 22482, 22517, 25798, 25799, 25800.

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

Partial—Bill of Lading attached to Order Nos. 21184, 22967 and 22346.

On September 16 and 17, 1964, Mr. Lawrence examined the books and records of the Borden Cabinet Corporation referred to above. Mr. Hicks requested that Mr. Lawrence obtain addresses of certain Borden employees. He examined the payroll records and obtained the information. On September 17, 1964, Mr. Hicks accompanied Mr. Lawrence to interview employees. Mr. Lawrence examined books and records which had been only partially examined by Mr. Lawrence during the civil audit as Mr. Hicks required two (2) more days of criminal investigation on September 16 and 17, 1964. The plaintiff intentionally deceived the taxpayers in conducting these two (2) days of investigation as found above.

9(B). Second Stage of Criminal Investigation.

During this stage, the defendants and none of the officers, directors, stockholders, or employees of the corporations were informed directly or indirectly that a criminal investigation was being conducted by the United States of America with respect to Mr. Habig or Mr. Schroering. During this stage, the agents of the plaintiff interrogated Mr. Schroering and obtained the cooperation of Mr. Schroering and that of the corporate personnel through Mr. Schroering to conduct a criminal investigation of himself and Mr. Habig without Mr. Schroering and Mr. Habig knowing they were being criminally investigated.

On September 21, 1964, Mr. Hicks and Mr. Lawrence met by prearranged appointment with Mr. Schroering in his office in the Jasper Corporation in the city of Jasper, Indiana. Mr. Hicks was introduced by Mr. Lawrence as Mr. "Russell C. Hicks". Mr. Hicks exhibited his written or printed credentials and said, "I am a Special Agent with the Intelligence Division: Mr. Kelly knows what my job is. I am here to determine if there is any criminal aspects

involved in the case." This was the first time that Mr. Hicks was introduced to, or had any contact with, Mr. Schroering. Mr. Robert Kelly of the corporations' accounting firm of Seidman & Seidman was present. At no time during this meeting or at any of the earlier contacts of Mr. Lawrence with Mr. Schroering in the first stage of the criminal investigation was Mr. Schroering told that he was the subject of a criminal investigation or was any advice or warning given to Mr. Schroering by either Mr. Lawrence or Mr. Hicks concerning any of Mr. Schroering's constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. Mr. Hicks requested Mr. Schroering to produce the books and records of the corporations and requested permission to examine them. It was concluded that Mr. Schroering would send the books and records to the office of Seidman & Seidman.

9(C). Third Stage of Criminal Investigation.

During this stage the defendants and none of the officers, directors, stockholders, or employees of the corporations were informed directly or indirectly that a criminal investigation was being conducted by the United States of America with respect to Mr. Habig or Mr. Schroering. During this stage, Mr. Schroering gathered and assembled the books and records of the corporations and had them delivered to the office of the corporations' accountants in the city of Evansville, Indiana, as previously requested by the said agents of the plaintiff. Both agents thereafter spent twenty-five (25) days examining them. They made photo copies of many thereof without obtaining permission or authorization of anyone including Mr. Habig and Mr. Schroering. Following which Mr. Schroering was again interviewed by the agents.

Between September 22, 1964 and October 1, 1964, Mr. Lawrence and Mr. Hicks made six (6) visits to the office

of the accountants and there examined such books and records.

On September 23, 1964, the agents obtained certain inventory sheets of Borden Cabinet Corporation from accountant, Mr. Kelly of the firm of Seidman & Seidman, and copies were made and retained and consisted of the following:

> Records of Borden Cabinet Corporation
>
> Inventory sheets dated June 30, 1959, consisting of seventeen (17) sheets. Inventory sheets dated June 30, 1960, consisting of thirty-two (32) sheets.

On October 2, 1964, Mr. Lawrence and Mr. Hicks again visited the office of the accountants and requested permission of an accountant, Mr. Kelly, to take certain pages from the journals of the corporations to the office of the Internal Revenue Service. Mr. Kelly granted such permission. The journal pages consisted of the following:

> Jasper Corporation's Cash Journal, page 138;
>
> Borden Cabinet Corporation's Cash Journal, page 77;
>
> Gordonsville Manufacturing Company's Cash Journal, pages 34 and 71;
>
> Evansville Veneer & Lumber Company's Cash Journal, pages 67, 85, 93 and 104;
>
> W. W. Kimball Company's Cash Journal, pages 157-F and 227-D.

The journal pages were taken to the office of the Internal Revenue Service where xerox copies were made and retained by the plaintiff.

On December 18, 1964, Mr. Lawrence and Mr. Hicks again interviewed Mr. Schroering and prepared a record of such interview.

9(D). Fourth Stage of Criminal Investigation.

During this stage the defendants and none of the officers, directors, stockholders, or employees of the corporations were informed directly or indirectly that a criminal investigation was being conducted by the United States of America with respect to Mr. Habig or Mr. Schroering. During this stage, Mr. Schroering gathered and assembled records by reason of an additional request of Mr. Hicks. The agents thereafter spent an additional thirty (30) days examining them and later copying them without permission or authorization of anyone including Mr. Habig and Mr. Schroering. During this stage the agents met with Mr. Habig and Mr. Schroering in the office of the office of the Intelligence Division of the Internal Revenue Service of the plaintiff. No warnings of their rights were given.

In August of 1965, the additional records requested by Mr. Hicks were caused to be transported by Mr. Schroering. The agents examined such records for an additional thirty (30) days in the office of the Evansville Veneer & Lumber Company in Evansville, Indiana.

On September 20, 1965, Mr. Hicks and Mr. Lawrence met with Mr. Habig and Mr. Schroering in the office of the Intelligence Division of the Internal Revenue Service of the plaintiff. Mr. Hicks interrogated Mr. Habig to determine the extent of his knowledge regarding the affairs which were being investigated. Mr. Habig was questioned on the state of his health, his age and his family situation. Both Mr. Habig and Mr. Schroering were asked for more information on the corporations. This was Mr. Habig's first personal contact with either agent after the criminal investigation began; there were no warnings to either of the defendants of their constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution and neither defendant was advised that he was the subject of a criminal investigation. Mr. Habig was not informed at any time that he was a suspect or

subject of the criminal investigation and he was never advised by either of the plaintiff's agents as to any of his constitutional rights.

On November 23, 1965, Mr. Hicks brought with him a portable photo copying equipment to the private room at Evansville Veneer & Lumber Company where records of the corporations had been assembled for examination by the plaintiff's agents as requested. The bringing of the equipment and the copying were done behind closed doors without the permission or authorization or knowledge of anyone, including the defendants. The records photo copied consist of the following:

RECORDS OF W. W. KIMBALL COMPANY

Sales Account No. 101 and Inventory Account No. 21 from the General Ledger of W. W. Kimball Company covering the period March 1, 1959 through June 30, 1960.

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

Purchases Account 135-237 and Inventory Account No. 21 from the General Ledger of Evansville Veneer and Lumber Company covering the period July 1, 1959 through August 15, 1960.

RECORDS OF THE JASPER CORPORATION

Pages 138 and 139 of Cash Journal of Jasper Corporation covering the period July 1, 1959 through August 15, 1960.

RECORDS OF LAFAYETTE MANUFACTURING COMPANY (formerly known as GORDONSVILLE MANUFACTURING COMPANY)

Pages 34, 71 of Cash Journal of Gordonsville Manufacturing Company covering the period March 1, 1959 through August 12, 1960.

Purchases Account 135-237 and Inventory Account No. 21 of General Ledger of Gordonsville Manufacturing Company covering the period March 1, 1959 through August 12, 1960.

On December 16, 1965, Mr. Lawrence obtained certain records, inventory sheets of the Jasper Corporation, Evansville Veneer & Lumber Company, Inc., and W. W. Kimball Company from one Janet McIntire, an employee of the Evansville Veneer & Lumber Company, Inc. Copies were made and retained by the plaintiff's agents. This was done without the knowledge or consent of anyone, including the defendants. The records copied were the following:

RECORDS OF JASPER CORPORATION

110 Sheets Re Inventory of Jasper Corporation June 30, 1959 and June 30, 1960.

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

7 Sheets Re Inventory of Evansville Veneer and Lumber Company June 30, 1959 and June 30, 1960.

RECORDS OF W. W. KIMBALL COMPANY

5 Sheets Re Inventory of W. W. Kimball Company February 29, 1960 and June 30, 1960.

On January 19 and 31, 1966, the plaintiff's agents by way of administrative summons obtained copies of workpapers and correspondence relating to the corporations from the accountants, Seidman and Seidman. The plaintiff's agents microfilmed them.

Between February 2 and February 7, 1966, Mr. Hicks brought with him portable microfilming camera equipment to the private room at Evansville Veneer & Lumber Company where records of the corporations had been assembled for examination by the plaintiff's agents as requested. The bringing of the equipment and the microfilming was done behind closed doors without the permission or authorization or knowledge of anyone, including the defendants. The records microfilmed consist of the following:

RECORDS OF W. W. KIMBALL COMPANY

Portions of the corporate minute book of W. W. Kimball Company covering the period March 1, 1959 through June 30, 1960.

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

Portions of the corporate minute book of Evansville Veneer & Lumber Co., Inc. covering the period January 1959 through June 1960.

RECORDS OF THE JASPER CORPORATION

Inventory Account No. 21 and Purchases Account No. ..... of General Ledger of Jasper Corporation covering the period July 1, 1959 through August 15, 1960.

Portions of corporate minute book of Jasper Corporation covering the period January 1959 through June 1960.

RECORDS OF BORDEN CABINET CORPORATION

Purchases Account 121-135 and Inventory Account No. 21 of General Ledger of Borden Cabinet Corporation covering the period July 1, 1959 through August 15, 1960.

Portions of corporate minute book of Borden Cabinet Corporation covering the period January 1959 through June 1960.

RECORDS OF LAFAYETTE MANUFACTURING COMPANY (formerly known as GORDONSVILLE MANUFACTURING COMPANY

Portions of corporate minute book of Gordonsville Manufacturing Company covering the period March 1, 1959 through June 30, 1960.

10. The records and evidence obtained by the plaintiff's agents during the criminal investigation (Findings of Fact 8, 9, 9(A), 9(B), 9(C) and 9(D) were without a search warrant, summons or subpoena upon the defendants or

upon any of the officers or any appropriate agent of the corporations and without warning the defendants of their rights. The records and evidence is material to the prosecution of the criminal indictment against the defendants.

11. The defendants were not represented by legal counsel at any of the occasions when the plaintiff's agents contacted or interviewed them, or at any time during the criminal investigation.

12. The conduct of the plaintiff's agents since about September of 1963 to the end of the investigation was stealthy and subtle and effectively resulted in the unopposed disclosure of necessary records and evidence for criminal purposes in the prosecution of the defendants. The defendants in 1963 became acquainted with Mr. Lawrence in the capacity of a civil agent. He became an unauthorized criminal sleuth about September 1963 unknown to the plaintiff and defendants. Mr. Lawrence became an authorized criminal sleuth in early 1964 unknown to the defendants. During these times, the defendants cooperated with Mr. Lawrence believing that he was conducting a civil investigation.

The defendants were lulled into the continuing belief that plaintiff was engaged in an ongoing civil audit of the income tax returns of the five (5) corporations and were concerned only with those corporations. There was nothing in the agents' statements or conduct to alert the defendants or to make either of them aware that they, individually, were the subjects of the criminal investigation and that criminal evidence was being gathered to be used against them. Even if it could be factually found that the defendants, or either of them, at some point in time should have been or were alerted that something more than a civil audit was being conducted, the deception of the plaintiff's agents had so deceived them that they had the right to

believe it was some other individual, or that the plaintiff's agents' deception had been so complete that one or both felt it would be futile to object to further cooperation since the plaintiff's agents had successfully acquired the basic evidence and records before the time when defendants should have known of the criminal nature of the investigation involving them. It must be inferred that the corporations and the defendants would not have consented to the criminal investigation had they known of the deceit practiced by plaintiff's agents prior to September 21, 1964.

13. The evidence and records acquired by the plaintiff's agents during the criminal investigation was not and were not duplicative of any evidence and records obtained prior thereto.

To the extent that Mr. Lawrence had seen or looked at any of the corporate records, except for such found in items 1 through 7 of these findings, he had only a general recollection and could not recall the facts, figures or other details of such records. The ensuing two (2) years of criminal investigation by Mr. Lawrence of such records renders it unfactual to believe that in 1964 and thereafter that his recollection stems wholly from the records and evidence reviewed in 1963.

Mr. Lawrence was also effectually impeached as to the reliability of his memory. On November 2, 1965, Joseph Raymond Eiselein was employed as Office Manager of Evansville Veneer & Lumber Company. Mr. Lawrence never had any contact with Mr. Eiselein before November 2, 1965, despite Mr. Lawrence's testimony on four (4) different occasions that he had talked to Mr. Eiselein all through the civil audit examination in 1963.

CONCLUSIONS OF LAW

1. The defendants are "aggrieved persons" under Rule 41(e) of the Federal Rules of Criminal Procedure and have maintained the burden of proving the essential elements of their August 27, 1968 motion to suppress since it has been found that the evidence seized by plaintiff after February 11, 1964 was without a search warrant or subpoena.

2. The plaintiff has failed to maintain its burden of proof that the evidence seized after February 11, 1964 was otherwise legally obtained without such legal process.

3. The certain records of Evansville Veneer & Lumber Co., Inc., the Jasper Corporation, Borden Cabinet Corporation, and Lafayette Manufacturing Company (formerly known as Gordonsville Manufacturing Company) obtained prior to February 11, 1964 and identified in trial Exhibits 101 and 102 were lawfully acquired by the plaintiff during the conduct of a civil income tax audit of the records of the Jasper Corporation and subsidiaries.

4. The plaintiff has failed to prove that it obtained the evidence it acquired after February 11, 1964 by means of sources which were independent and separate and distinguishable from the unlawful seizures of records and interrogations of the defendants occurring after February 11, 1964.

5. The plaintiff has failed to prove that the evidence and the leads to evidence obtained after February 11, 1964 and the fruits thereof were merely duplicative of evidence and leads obtained prior to February 11, 1964.

6. The original consent given in February 1963 for a civil Federal income tax examination of the Jasper Corporation and its subsidiaries terminated when plaintiff's purpose shifted on February 11, 1964 to a criminal investi-

gation and plaintiff failed to inform the defendants of their constitutional rights.

There was no knowing and intelligent waiver by the defendants of their constitutional rights and thus no consent to the further examination and copying of records of the Jasper Corporation and its subsidiaries after February 11, 1964.

7. The plaintiff's agents after February 11, 1964 had the duty upon the first contact with defendants to advise them of their constitutional rights and advise them that they were the subject of a criminal investigation. The statements, information and leads to evidence obtained by the plaintiff's agents from the defendants after February 11, 1964 were illegally obtained by reason of the failure of the plaintiff's agents to fulfill such duty as the criminal investigation was focused on the two (2) defendants from and after February 11, 1964.

8. The law is with the defendants and against the plaintiff.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the defendant's motion to suppress filed August 27, 1968 is GRANTED in PART and DENIED in PART.

The following evidence is hereby ORDERED SUPPRESSED for use as evidence in this case by the United States of America and is suppressed for use in any other criminal proceedings against the defendants by the United States of America or any of its agencies:

1. The evidence acquired by plaintiff on May 26, 1964 including an affidavit of the Jasper Corporation and a brief used in a proceeding commenced by a labor union against its subsidiary, W. W. Kimball Company; and information acquired concerning dates and events of a movement of

machinery and materials of W. W. Kimball Company from Illinois to Indiana; and the leads to other evidence therefrom and the fruits thereof.

2. The evidence, leads and fruits therefrom acquired on June 5, 1964 from the office of W. W. Kimball Company, including the names and addresses of former employees of that company; its payroll records, its retained W-2 Forms and its Employer's Quarterly Federal Tax Returns (Form 941).

3. The evidence, leads and fruits therefrom acquired June 15, 16 and 17, 1964 from former employees of W. W. Kimball Company.

4. The evidence, leads and fruits therefrom acquired on June 18 and 19, 1964 from an interview with the defendant, Mr. Schroering, in the office of Jasper Corporation and from records examined and copied on those days of the Jasper Corporation and its subsidiaries, including the completion of the plaintiff's civil agent's incomplete work sheet identified in evidence as Exhibit 107 and including the knowledge gained by the examination of books and records used to attempt to reconcile books deductions with invoices of intercompany sales of lumber and veneer. Certain of the evidence obtained by plaintiff on these dates include the following:

(A) Records of the Jasper Corporation.

Invoices of W. W. Kimball Company reflecting sales to Jasper Corporation, as follows:

Order No.	Date Entered	Total Amount
21649	2/29/60	$1,827.69
22065	2/29/60	160.00
22214	2/29/60	524.34
22217	2/29/60	1,786.85
22988	10/ 3/59	1,986.08
22989	10/ 6/59	1,717.73
22990	11/20/59	81.98
22991	2/29/60	2,244.24

Order No.	Date Entered	Total Amount
22992	2/ 4/60	$ 204.32
22993	12/17/59	646.02
22994	12/17/59	57.82
22997	2/ 3/60	1,482.29
23003	2/27/60	873.96
23004	2/27/60	524.18
23005	2/27/60	226.82
23006	12/ 2/59	596.93
23011	11/10/59	98.27
23013	11/10/59	291.27
22224	4/ 7/60	16.56
22237	3/ 3/60	1,079.70
22240	3/ 4/60	624.00
22241	3/ 4/60	30.80
22242	3/ 4/60	1,204.37
22243	3/ 4/60	75.04
22244	3/ 4/60	25.80
22245	3/ 4/60	235.48
22248	3/ 4/60	411.80
22249	3/ 4/60	90.12
22344	3/ 7/60	2,686.81
22453	3/14/60	3.28
22456	3/14/60	12.10
22458	3/14/60	14.62
22459	3/14/60	501.01
22484	3/14/60	801.80
22485	3/14/60	450.32
22585	3/25/60	16.10
22608	3/25/60	24.00
22609	3/25/60	134.66
22610	3/25/60	17.16
22656	4/ 4/60	754.00
22657	4/ 4/60	34.26
22659	4/ 4/60	144.99
22697	4/11/60	286.50
22698	4/11/60	41.88
22699	4/11/60	100.00
22700	4/11/60	102.90
22720	4/19/60	129.92
22721	4/19/60	24.80
22723	4/19/60	492.29

Order No.	Date Entered	Total Amount
22754	4/21/60	$ 134.21
22756	4/21/60	13.62
22757	4/22/60	263.88
22822	5/13/60	139.72
22823	5/13/60	900.45
22824	5/13/60	34.72
22858	4/26/60	65.20
22859	4/26/60	2,561.00
22866	4/27/60	650.00
22892	4/28/60	266.88
22929	5/ 5/60	1,136.25
22933	5/ 5/60	80.76
22937	5/ 6/60	58.74
22955	5/18/60	4,010.03
22961	5/18/60	622.07
23020	5/20/60	1,407.81
23056	5/23/60	221.30
23081	5/26/60	1,698.27
23126	5/31/60	3,361.51
23139	6/ 2/60	640.00
23190	6/ 7/60	1,031.25
23196	6/10/60	420.90
23222	6/13/60	75.24
23881	6/30	5,338.98

Partial — Bill of Lading No. 37048 attached to Order No. 21649; Bill of Lading attached to Order Nos. 22214, 22217, 22988 through 22994, 23003, 23006, 23011, 23013, 22224, 22240, 22242, 22245, 22344, 22458, 22459, 22484, 22697, 22700, 22723, 22754, 22756, 22822, 22824, 22933, 22937, 22955, 23020, 23056, 23081, 23126, 23139, 23190, 23196, 23222, 23881.

Receiving record or receiving report No. 8196 attached to Order No. 21649; Receiving record or receiving report No. 09384 attached to Order No. 22065; Receiving record or receiving report attached to Order Nos. 22214, 22216, 22217, 22989 through 22994, 23003, 23005, 23006, 23011, 23013.

Memorandum attached to Order Nos. 22213, 22216, 22988, 22989, 22997, 23003, 23004, 22237, 22248, 22249, 22929, 22961, 23020, 23056, 23081, 23126, 23139, 23881.

(B) Records of Lafayette Manufacturing Company (formerly known as Gordonsville Manufacturing Company)

Invoices of W. W. Kimball Company reflecting sales to Gordonsville Manufacturing Company, as follows:

Order No.	Date Entered	Total Amount
21536	2/15/60	$ 185.66
22045	2/27/60	95.26
22204	2/29/60	928.20
22976	9/23/59	3,982.00
22977	9/29/60	1,880.00
22979	10/ 6/59	1,716.35
22980	10/12/59	350.00
22984	10/26/59	775.00
22981	10/14/59	173.84
22985	11/ 9/59	250.00
22987	11/20/59	73.00
23000	1/27/60	833.34
23007	2/ 2/60	382.42
23010	2/27/60	244.26
22482	3/14/60	145.60
22517	3/18/60	204.32
25798	6/30/60	433.67
25799	6/30/60	539.92
25800	6/30/60	239.17

Partial — Bill of Ladings attached to Order Nos. 21536, 22045, 22202 through 22205, 22207, 22976, 22977, 22979, 22980, 22984, 22981, 22985, 22987, 23000, 23010, 22452, 22517.

Receiving record or receiving report attached to Order Nos. 22202, 22203, 22205, 22207, 22977, 22979, 22980, 22984, 22981.

Memorandum attached to Order Nos. 22045, 22985, 23000, 23007, 23010, 22482, 22517, 25798, 25799, 25800.

(C) Records of Evansville Veneer & Lumber Co., Inc.

Partial—Bill of Lading attached to Order Nos. 21184, 22967 and 22346.

5. The evidence, leads and fruits therefrom acquired on September 16 and 17, 1964 from an interview with Mr. Schroering and from an examination of books and records of the Borden Cabinet Corporation, including the names and addresses of certain employees of Borden Cabinet Corporation obtained from payroll records and other information including interviews with certain employees.

6. The evidence, leads and fruits of the interview between plaintiff's agents and the defendant, Mr. Schroering, on September 21, 1964.

7. The evidence, leads and fruits of the examination of the books and records of the Jasper Corporation and interviews between plaintiff's agents and the defendant, Mr. Schroering, during the twenty-five (25) working days during the period from September 21, 1964 to the end of the year. This includes the following copied records taken September 23, 1964:

Records of Borden Cabinet Corporation

Inventory sheets dated June 30, 1959, consisting of seventeen (17) sheets. Inventory sheets dated June 30, 1960, consisting of thirty-two (32) sheets.

This includes the following copied records taken October 2, 1964:

Jasper Corporation's Cash Journal, page 138;

Borden Cabinet Corporation's Cash Journal, page 77;

Gordonsville Manufacturing Company's Cash Journal, pages 34 and 71;

Evansville Veneer & Lumber Company's Cash Journal, pages 67, 85, 93 and 104;

W. W. Kimball Company's Cash Journal, pages 157-F and 227-D.

This includes the following record made December 18, 1964:

Record made of interview between plaintiff's agents and the defendant, Mr. Schroering.

8. The evidence, leads and fruits therefrom during the period January 1965 through April 1966 consisting of thirty (30) additional working days of examining and copying of the books and records of the Jasper Corporation and its subsidiaries and from interviews conducted between plaintiff's agents and the defendants. This includes the September 20, 1965 interviews and the record thereof between the plaintiff's agents and the defendants. This includes the November 23, 1965 photo copying of the following records:

Records of W. W. Kimball Company

Sales Account No. 101 and Inventory Account No. 21 from the General Ledger of W. W. Kimball Company covering the period March 1, 1959 through June 30, 1960.

Records of Evansville Veneer & Lumber Co., Inc.

Purchases Account 135-237 and Inventory Account No. 21 from the General Ledger of Evansville Veneer and Lumber Company covering the period July 1, 1959 through August 15, 1960.

Records of the Jasper Corporation

Pages 138 and 139 of Cash Journal of Jasper Corporation covering the period July 1, 1959 through August 15, 1960.

Records of Lafayette Manufacturing Company (formerly known as Gordonsville Manufacturing Company)

Pages 34, 71 of Cash Journal of Gordonsville Manufacturing Company covering the period March 1, 1959 through August 12, 1960.

Purchases Account 135-237 and Inventory Account No. 21 of General Ledger of Gordonsville Manufacturing Company covering the period March 1, 1959 through August 12, 1960.

This includes records copied on December 16, 1965 as follows:

RECORDS OF JASPER CORPORATION

110 Sheets Re Inventory of Jasper Corporation June 30, 1959 and June 30, 1960.

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

7 Sheets Re Inventory of Evansville Veneer and Lumber Company June 30, 1959 and June 30, 1960.

RECORDS OF W. W. KIMBALL COMPANY

5 Sheets Re Inventory of W. W. Kimball Company February 29, 1960 and June 30, 1960.

This includes any books and records of the Jasper Corporation and its subsidiaries taken from the accounting firm of Seidman and Seidman on or about January 19 and January 31, 1966, and copied. (This does not include the personal records of the accounting firm that were taken and copied.) This includes all of the books and records that were copied and/or microfilmed between February 2 and February 7, 1966 in the offices of Evansville Veneer & Lumber Company and which include everything microfilmed as well as the following:

RECORDS OF W. W. KIMBALL COMPANY

Portions of the corporate minute book of W. W. Kimball Company covering the period March 1, 1959 through June 30, 1960.

RECORDS OF THE EVANSVILLE VENEER & LUMBER CO., INC.

Portions of the corporate minute book of Evansville Veneer & Lumber Co., Inc. covering the period January 1959 through June 1960.

RECORDS OF THE JASPER CORPORATION

Inventory Account No. 21 and Purchases Account No. ..... of General Ledger of Jasper Corporation covering the period July 1, 1959 through August 15, 1960.

Portions of corporate minute book of Jasper Corporation covering the period January 1959 through June 1960.

RECORDS OF BORDEN CABINET CORPORATION

Purchases Account 121-135 and Inventory Account No. 21 of General Ledger of Borden Cabinet Corporation covering the period July 1, 1959 through August 15, 1960.

Portions of corporate minute book of Borden Cabinet Corporation covering the period January 1959 through June 1960.

RECORDS OF LAFAYETTE MANUFACTURING COMPANY (formerly known as GORDONSVILLE MANUFACTURING COMPANY)

Portions of corporate minute book of Gordonsville Manufacturing Company covering the period March 1, 1959 through June 30, 1960.

IT IS FURTHER ORDERED that the following evidence is not suppressed and the motion was denied as to it:

9. The incomplete work sheet of the plaintiff's civil agent as it existed on February 11, 1964 (being part of evidentiary Exhibit 107).

10. The following records of Evansville Veneer & Lumber Co., Inc.:

RECORDS OF EVANSVILLE VENEER & LUMBER CO., INC.

Invoices of W. W. Kimball reflecting sales to Evansville Veneer & Lumber Company, as follows:

Order No.	Date Entered	Total Amount
21184	2/ 8/60	$ 1,525.29
22208	2/29/60	29,939.47
22209	2/29/60	36,057.25
22212	2/29/60	15,038.02
22215	2/29/60	15,229.56
22218	2/29/60	9,203.87
22221	2/29/60	16,787.22
22967	2/29/60	16,756.38
22346	3/ 7/60	415.20
25792	6/30/60	30,403.98
25793	6/30/60	23,129.35
25794	6/30/60	11,024.28

11. The following records of the Jasper Corporation, Borden Cabinet Corporation and Lafayette Manufacturing Company:

(A) Records of the Jasper Corporation. Invoices of W. W. Kimball Company reflecting sales to Jasper Corporation as follows:

Order No.	Date Entered	Total Amount
21480	1/ 8/60	$14,887.99
22213	2/29/60	67,803.15
22216	2/29/60	7,266.86
22220	2/29/60	5,040.00
22223	6/30	3,834.60
None Shown	6/30	10,040.34
None Shown	6/30	10,032.00

(B) Records of Borden Cabinet Corporation. Invoices of W. W. Kimball Company reflecting sales to Borden Cabinet Corporation as follows:

Order No.	Date Entered	Total Amount
22211	2/29/60	$50,018.40
25791	6/30/60	25,176.00

(C) Records of Lafayette Manufacturing Company (formerly known as Gordonsville Manufacturing Company). Invoices of W. W. Kimball Company reflecting sales to Lafayette Manufacturing Company as follows:

Order No.	Date Entered	Total Amount
22202	2/29/60	$ 8,693.75
22203	2/29/60	7,832.00
22205	2/29/60	6,371.50
22206	2/29/60	13,317.00
22207	2/29/60	13,490.63
25795	6/30/60	14,291.31
25796	6/30/60	13,850.98
25797	6/30/60	15,367.21

Dated this 11 day of May, 1971.

/s/ CALE J. HOLDER,
Cale J. Holder, *Judge, United States District Court, Southern District of Indiana.*

The taxable years of the Jasper Corporation and all of the subsidiaries listed above with the exception of Gordonsville Mfg. Inc. were fiscal years ending June 30, 1960. The taxable year of Gordonsville Mfg. Inc. was the taxable period of March 7, 1959 to February 29, 1960. Gordonsville Mfg. Inc. had been organized March 7, 1959, and shortly thereafter acquired its production facilities at Lafayette, Tenn.

For taxable year ended February 28, 1959 W. W. Kimball Company had an unused net operating loss carryover in the amount of $253,721.64 comprised of the following:

A.	Loss for period May 9, 1957 to Feb. 28, 1958	$191,755.05
B.	Loss for period ended Feb. 28, 1959	61,966.59
	Total net operating loss carryover	$253,721.64

Explanation for short period May 9, 1957 to February 28, 1958, is that W. W. Kimball Company had been consolidated with J. Emil Anderson & Sons, Inc. for period March 1, 1957 to May 8, 1957.

During the period July 1, 1959 to June 30, 1960 the following returns were filed by the Jasper Corporation and its subsidiaries:

Name	Period Ended	Taxable Income Reported
W. W. Kimball Co.	2/29/60	$(127,633.71)
W. W. Kimball Co.	6/30/60	3,575.93
Gordonsville Mfg., Inc.	2/29/60	30,235.76
Gordonsville Mfg. Inc.	6/30/60	17,831.68
Jasper Corporation	6/30/60	113,417.44
Borden Cabinet Corporation	6/30/60	55,939.33
Habig Mfg., Inc.	6/30/60	24,196.38
Jasper American Mfg. Co.	6/30/60	24,020.42
Evansville Veneer & Lumber Co.	6/30/60	93,372.62
Jasper Stylemasters	6/30/60	23,984.33
		$258,940.18

It is noted that during the period of 2/29/59 to 6/30/60 the profit of W. W. Kimball Company amounted to $257,297.57 which not only absorbed the net operating loss carryover of $253,721.64 but resulted in enough profit to pay some tax for taxable period ended 6/30/60.

For taxable years ended June 30, 1961 and June 30, 1962, the Jasper Corporation and other members of the

affiliated group filed consolidated returns which included the taxable incomes of the following:

Name	Taxable Income 6/30/61	6/30/62
The Jasper Corporation	$286,059.73	$292,406.99
The Borden Cabinet Corporation	311,374.63	529,511.27
Evansville Veneer & Lumber Co.	500,064.99	326,231.83
Cabinet Mfg. Corporation	40,480.96	(36,279.45)
Jasper American Mfg. Co.	9,171.87	38,992.92
Jasper Stylemasters, Inc.	59,108.50	109,783.82
S. & S. Mfg. Co.	(208,996.56)	26,898.17
Lafayette Mfg. Co.	71,941.90	(101,630.84)
W. W. Kimball Co.	(688,632.67)	(1,039,947.78)
Jasper Electronics		(53,288.05)
Kimball Pianos, Inc.	3,200.54	10,769.32
Habig Mfg. Inc.	9,545.29	2,803.84

It is noted that W. W. Kimball Company suffered losses in both of the above years. Fluctuation in profits of various other corporations of the affiliated group are also noticeable for years of 6/30/59, 6/30/60, 6/30/61 and 6/30/62.

A comparison of the several items making up cost of goods sold for years ended 6/30/60, 6/30/61 and 6/30/62 of Evansville Veneer & Lumber Company before any changes made in the examination revealed fluctuations in the percentage of sales dollar.

As a result invoices entered at the close of the year 6/30/60 as purchases from W. W. Kimball, on the books of Evansville Veneer and Lumber Company, were requested. This was at the office in Evansville where the examination was made. At the same time a copy of the ending inventory as of 6/30/60 was requested. Neither the inventory nor the invoices were at Evansville. At Mr. Roman Oser's request the Comptroller, Mr. Jerome

Schroering, came from Jasper with the invoices and inventory which were given to the examiner.

Mr. Schroering was asked how the material was shipped and he replied "probably by company truck." He was asked if any receiving reports were made on materials. He said he would have to check. He was asked if receiving tickets were made on all shipments received and he said not all the time. The examiner informed him that he wanted to see subsidiary records to show that the material was received.

After the examination of Evansville Lumber & Veneer was completed as far as possible, the examiner went to Lafayette, Tennessee, where the Lafayette Mfg. Co., (previously named the Gordonville Mfg. Co.) is located, and commenced examination. At the end of February 1960 purchases of lumber from W. W. Kimball Company totaling $40,069.80 were entered and at the end of June 1960 purchases of lumber from W. W. Kimball in the amount of $43,509.50 were entered. As in the case of Evansville Veneer and Lumber Co., invoices and receiving reports were requested and none could be found by the bookkeeper. Here, the manager Mr. Wells was asked about receiving reports and he stated they did not have them and did not know about them. He stated that all Kimball transactions were handled before he got there. He said that Bob Seeger and Roman Oser handled everything. The bookkeeper had previously stated that he was not there when the transactions occurred. He was asked in whose handwriting the entries regarding the shipments were made, and he said he thought it was Jerome Schroering's handwriting. The examiner went to Borden, Indiana, where the Borden Cabinet Company is located. Here at the end of February 1960, $50,018.40 worth of invoices representing purchases of lumber from W. W. Kimball Company were deducted. At the end of June 1960, $25,-

176.00 representing purchases of lumber from W. W. Kimball Company were deducted. Again no invoices were available. The bookkeeper at Borden had been at Borden at the time these transactions were supposed to have occurred. She was asked if at that time the company followed the practice of preparing receiving reports. She said yes. She was asked if ordinarily the receiving ticket was attached to the invoice. She replied in the affirmative. She was asked if she recalled seeing a receiving ticket prepared for materials received from W. W. Kimball Co. She shook her head indicating "no."

Next the examination of W. W. Kimball books was commenced. The examiner had hoped to verify whether W. W. Kimball had ever possessed the materials necessary to make the sales. This might have been done by segregating the beginning inventory as to quantities and species, adding to such inventory the purchases as to quantities and species, and then subtracting usage as to quantities and species. The remaining quantities, when compared to the quantities and species sold as indicated on the invoices, would be a test of whether the materials existed. However, the taxpayer could not produce the records necessary to make the test.

However, another test was devised. This one included the following steps, which disregarded quantities and species, but considered only the dollar amounts involved:

1. Take the totals of the beginning inventories as of February 29, 1959 of lumber and veneer. The inventory as of February 28, 1959, was taken in accordance with standard auditing procedures of the American Institute of Accountants.

2. Add to the amounts purchases of lumber and veneer for period 2/28/59 to 6/19/59 as listed on the ledger cards maintained under the Kimball system.

3. Subtract material usage as entered on the cards under the Kimball System through 6/19/59.

4. Determine purchases for period 6/19/59 through 6/30/60 by subtracting from the total purchases of lumber and veneer for both periods (FY end 2/29/60 and FY end 6/30/60) as listed on Seidman & Seidman workpapers the amount obtained in step 2 above.

5. Add the figure obtained in 4 above to the figure obtained as results of steps 1, 2 and 3 above.

6. The resulting figure should give in dollars the amounts of lumber and veneer which were available for sale and manufacture during the period 6/19/59 through June 30, 1960, which could be compared to the sales during this period.

The results of the above test indicated that the purchases of Jasper Corporation and its subsidiaries exceeded the materials available for usage by an amount of $270,802.25. This difference does not take into account the material used in production between 6/19/59 and the time which production ceased during 1960.

In response to a request that invoices representing amounts deducted by the various corporations mentioned be furnished, together with receiving reports or other evidence of receipt, the comptroller finally produced numerous invoices from W. W. Kimball, and some unmatched receiving reports and bills of lading. The examiner selected those invoices having the same characteristics as those of Evansville Veneer & Lumber Company, and requested receiving reports for them. The comptroller stated he could not find them. The examiner informed him that unless receiving reports or other evidence of receipt were received, the purchases would be disallowed. He said he would have to search further.

Since informing the comptroller that the purchases would be disallowed unless receipt of the materials were

substantiated, several conversations have been held with Mr. Robert Kelly of the firm of Seidman & Seidman. Mr. Kelly has offered several explanations regarding the peculiar circumstances concerning the invoices. He states that he does not know the information he has offered to be a fact but assumes or feels sure that the information he has given is what has happened. At no time has he stated he had actual knowledge of the shipment and receipt of the material or any of the other information offered.

Mr. Kelly explained the lack of receiving reports or other information substantiating shipments of material was due to the receiving reports and/or bills of lading probably being lost when the records of W. W. Kimball were moved from the plant at Chicago. He states, as was previously stated by the comptroller, that the receiving memoranda were sent by the recipients to W. W. Kimball at Chicago for the purpose of W. W. Kimball making out the invoices to the corporations which received the material.

Mr. Kelly claims after the purchase of W. W. Kimball that a decision was made to close the plant. According to him the closing led to much confusion. He stated that machinery, etc., was loaded into trucks and sent South, and some shipments were dropped off at one corporation and some at others, etc. He stated that the materials in question were not shipped at one time, but were shipped in various amounts throughout the year, and the totals of the shipments were invoiced at the close of the year.

His explanation for the difference between the dollar amounts of lumber and veneer available for usage or sale and the amounts billed the corporation on the invoices, was that the billings to the corporations probably included costs of labor and overhead. Mr. Kelly, although not sure of the facts, surmised that the material shipped was in the stage of partly finished products, and was not raw lumber or veneer.

Mr. Kelly, in answers to questions of the examiner, stated that the partly finished products probably were converted back for billing purposes to the raw stage of the materials involved. The examiner asked Mr. Kelly where a person would have obtained the information necessary to make the conversion. Mr. Kelly said probably from some accumulation of the data needed.

During previous conversation when examiner stated that receiving reports or other evidence was needed to substantiate the shipments Mr. Kelly asked what "other" evidence was needed. The examiner ventured that a statement from the person responsible for authorizing the shipments or preparation of the invoices to the effect that he had prepared them from receiving reports or bills of lading and from someone who had received some of the material might suffice. Mr. Kelly offered as proposed statements:

1. One statement to be signed by either Arnold F. Habig or Arnold F. and Tony Habig that the "method of billing" material transfers was authorized by them.

2. One proposed statement on part of "Tony" Habig that he "processed the billing of material transfers, that the invoices were prepared from source data of shipments, such as memos, bills of lading and receiving reports, that some of the materials which were in various stages of completion were converted back to board feet of lumber, etc."

After consultation by the examiner with the group supervisor, Mr. Kelly was informed by the examiner that the statements offered would not serve the purpose of receiving reports or other evidence that the goods actually moved. He was informed that disallowance of the entire $464,491.72 of purchases was contemplated and that the examiner would proceed to initiate forms 2808.

Later Mr. Kelly called and said he had some more proposed statements — one to be made by Arnold F. Habig

and Tony Habig, and the other by Jerome C. Schroering and Roman Oser. These proposed statements, while more elaborate than the others, merely reiterated what had previously been said by Mr. Kelly. Copies of all proposed statements, while not executed and submitted, were transcribed and retained by the examiner in his workpapers.

During one conversation the examiner stated that, from the facts that had been presented to date, it did not appear that the goods had moved. Mr. Kelly said, "As far as I am concerned the materials moved." He may have been inviting a proposal of closing the case by stating: "As far as I am concerned, disallowance of ½ would not be right, or 1/10 but———." Also, he indicated he wished the case could be closed at the examiner's level. That if it were not, all that would probably happen would be a long drawn out fight.

Summary

Attention is invited to the following features of the above information:

1. W. W. Kimball's record of losses before and after acquisition by the Jasper Corporation. It is noted that profitable operations occurred only during periods of alleged transactions.

2. The lack of receiving reports and bills of lading which would substantiate the movement of the materials.

3. Lack of information from anyone who had actual knowledge of the materials allegedly transferred. The quantities involved are not small since 3,000,000 square feet of veneer and over 1,000,000 board feet of lumber are involved.

4. The lack of records necessary for the examiner to test the amounts involved as to quantity and species, which would at least prove prove or disprove the probability that the movements of material could have occurred.

5. The lack of information as to who was responsible for preparation of the invoices, and what information he or they had at the time the invoices were prepared, to serve as these bases for data contained on the invoices.

6. The initial lack of invoices in the files of the purchasers when requested, and the lack of information on the invoices when finally furnished as to bill of lading number and, except as to one invoice, shipping instructions. The shipping instructions on the exception is, "their truck". Shipping information is included on all other accepted invoices which have been inspected, having to do with transfers of material between corporations of the affiliated group.

7. The difference in dollar amounts of the materials available for shipment by W. W. Kimball Company and materials purchased by the other corporations, and the offered explanation for such difference.

8. The explanation that the materials moved not as separate shipments or portions thereof, but moved in various amounts throughout the periods involved with billing made for total movements near the close of the taxable periods involved.

9. Fluctuation in the various figures comprising cost of sales or goods available for sale in the case of Evansville Veneer and Lumber Company from year to year.

10. The closing procedure at the close of the taxable periods involved. It appears that the books of Jasper Corporation at Jasper, Indiana, the Gordonsville Mfg. Co. Inc. a Lafayette, Tennessee, Borden Cabinet Corporation at Borden, Indiana, and the Evansville Veneer and Lumber Company at Evansville, Indiana were sent to one location and the entries regarding the invoices were made by one person instead of at the locations where the books were kept by the bookkeeper at that location.

11. The statement from one bookkeeper to the effect she never remembered seeing a receiving report involving lumber from W. W. Kimball Company.

12. Apparent invitation by the accountant for an offer to disallow a portion of the total amount involved.

It is difficult to evaluate the significance of the foregoing facts, which it appears, can not be developed further by Audit Division examining techniques.

It is possible that either of the following situations could exist within the scope of the facts:

1. Materials were shipped, and priced at an amount sufficient to eliminate the net operating loss carryover on the books of W. W. Kimball as of February 28, 1959, and whatever losses were in reality experienced by the W. W. Kimball Company for the taxable year ended February 29, 1960 and for the taxable period ended June 30, 1960.

2. Materials in quantities as indicated on the invoices were not shipped. This would mean that the transactions as entered on the books were fictitious and could have been made for the sole purpose of eliminating the existing net operating losses, in effect transferring them to profit corporations.

If 1 above is applicable, the nature of the adjustments is purely technical, involving an allocation under provisions of section 482 of the 1954 Internal Revenue Code. If 2 above is applicable the possibility of fraud appears to be involved.

The Jasper Corporation is directly or indirectly controlled by the Habig family of which Arnold F. Habig is the head. As of June 19, 1961 over 51.52% of the voting stock of Jasper Corporation were owned by the following individuals:

Arnold F. Habig 42.17%
T. L. Habig 5.22%
J. B. Habig 4.13%

T. L. and J. B. are the sons of Arnold. Approximately 24.29% of the voting stock was held by A. C. Sermersheim (8.11%); H. E. Thyen, (8.06%); R. F. Schneider (8.06%) and Maurice Kuper (.06%). These individuals are all officers of the corporation and are not related to the Habigs. The remainder of the stock is distributed among various individuals in the Dubois County area.

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Jasper Corporation et al
Jasper, Indiana

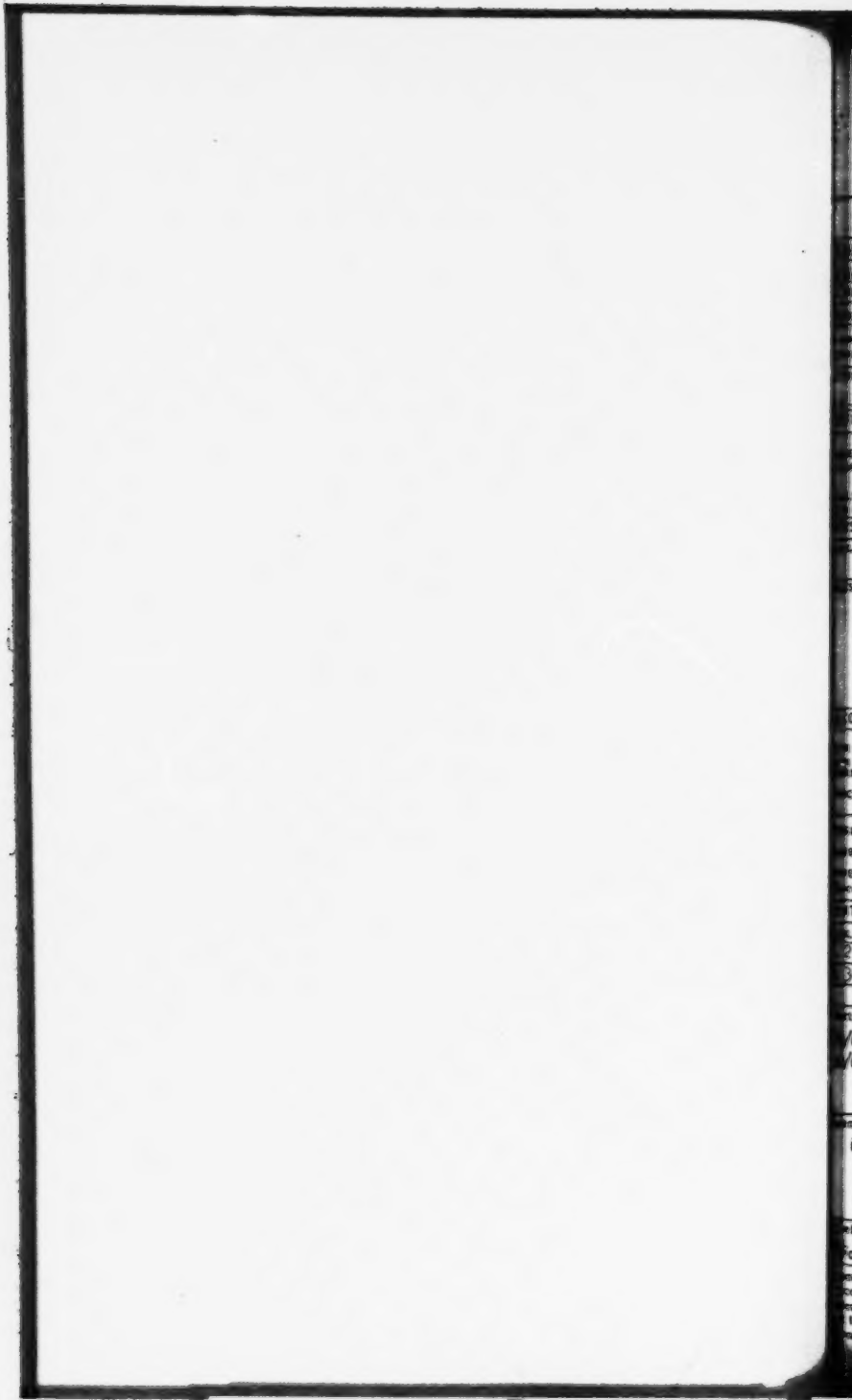
Exhibit A

	Jasper Corp. 6/30/60	Evansville Veneer & Lbr. Company, Inc. 6/30/60	The Borden Cabinet Corp. 6/30/60	Gordonsville Mfg. Inc. 6/30/60	Total 6/30/60	Gordonsville Mfg. Inc. 2/29/60
Taxable Income per ret.	$113,417.44	$ 93,372.62	55,939.33	17,831.68	280,561.07	30,235.76
Adjustments						
Other						
(a) Purchases	118,904.94	186,813.00	75,194.40	43,509.50	424,421.84	40,069.88
Technical						
(b) Repairs	23,162.41	10,066.36		3,138.86	36,367.70	6,147.08
(c) Factory supplies	3,357.59	3,955.36			7,312.95	
(d) Small tools	3,267.50				3,267.50	
(e) Professional services	13,514.72				13,514.72	
(f) Rents	12,000.00	3,300.00		2,000.00	17,300.00	6,000.00
(g) Stationery & Supplies	324.00	782.68			1,106.68	265.72
(h) Bad debts	10,311.05	1,293.00	5,493.80		17,097.85	
(i) Net profit from Habig Mfg. Inc.	24,196.38				24,196.38	
(j) Depreciation	(3,300.16)	(1,645.44)		(518.39)	(5,463.99)	(577.50)
(k) Ending inventory		29,233.92			29,233.92	
(l) Sales			34,533.80		34,533.80	
Total	$205,736.49	$233,798.88	$115,222.00	$48,129.98	$602,889.35	$51,905.18
Taxable income as corrected	319,155.93	327,171.50	171,161.33	65,961.66	883,450.42	82,140.94
Income tax on above	160,461.08	164,629.18	83,503.89	28,800.06	437,394.21	37,213.29
Income tax on return	53,370.78	43,053.76	23,588.45	7,439.14	127,452.13	10,222.60
Deficiencies	$107,090.30	$121,575.42	$59,915.44	$21,360.92	$309,942.88	$26,990.69

er Corporation et al
er, Indiana

Exhibit A-1

nnation of adjustments
Purchases - See item 12
Repairs - Items expensed are capitalized
Factory supplies - same as b above
Small tools - Same as b above.
Professional services - legal fees in connection with acquisition of W. W. Kimball stock, fees for services in connection with electrical and plumbing designs, and fees necessary to keep in existence a dormant corporation are in the nature capital expenditures and are not allowable as deductions.
Rents - $10,000.00 of rent paid by Jasper Corporation to Tropical Products Corporation for use of recreational area is excessive and is not allowable. The remaining adjustments comprises payments for purchases of machinery from W. W. Kimball Company.
Stationery and supplies - same as (b) above.
Bad debts - past experience of corporation does not justify additions to reserve for Bad Debts in the amounts as indicated, consequently, deductions for bad debts are disallowed.
Net profit from Habig Mfg. Inc. - Inasmuch as the control of Habig Mfg. Inc. is being used to reduce taxes of the Jasper Corporation, the income and expenses of Habig Mfg. Inc. are allocated to Jasper Corporation.
Depreciation - to allow depreciation on items capitalized in the above adjustments.
Ending inventory - ending inventory is increased for goods in transit which were not included in the inventory of June 30, 1960.
Sales - invoices totaling the above amount were entered as sales on July 1, 1960 and reported as sales for fiscal year ended June 30, 1961. Items included in the invoices were not inventoried as goods in transit as of June 30, 1960. Costs of the items were deducted as cost of goods sold for fiscal year ended June 30, 1960. Therefore, sales should be increased as indicated.



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A63

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4-1-64
RPT

REFERRAL REPORT FOR POTENTIAL FRAUD CASES

Ref. Audit Div. FEB 5 1964
Ref. Intell. Div. FEB 6 1964
Ref. Audit
Group Supervisor

NAME AND ADDRESS OF TAXPAYER
Jasper Corporation et al
Jasper, Indiana

TYPE OF TAX INVOLVED
Income

...has been reviewed by the Intelligence ... and action indicated taken

☐ REJECTED BEFORE PRELIMINARY INVESTIGATION (Statement of reasons attached)
☐ CLOSED AFTER PRELIMINARY INVESTIGATION (Copy of closing report attached)
☑ ACCEPTED FOR ... SCALE INVESTIGA...
☑ LEASE ASSIGN ... OPERATING OFFI...

...RE, CHIEF INTELLIGENCE DIVISION

...ERRAL REPORT CONCERNS -

...ERSTATEMENT OF ...ABLE INCOME
☐ FAILURE TO FILE RETURN FORM(S)
☐ OTHER (Specify)
...URE TO COLLECT ...PAY OVER TAX
☐ FAILURE TO MAINTAIN ADEQUATE RECORDS

...SONAL HISTORY Not applicable

	APPARENT HEALTH	STATUS	EDUCATION (Highest level)	NO. OF EXEMPTIONS (Incl... taxpayer & spouse)
	☐ GOOD ☐ POOR	☐ Single ☐ Married ☐ Head of household		

...S OF INCOME OF TAXPAYER AND SPOUSE (List principal occupations)

Not applicable

...CORDS WERE KEPT BY - ☐ TAXPAYER ☒ EMPLOYEES ☐ BOOKKEEPING SERVICE ☐ OTHER (Specify)

...RECEIPTS JOURNAL ...DISBURSEMENTS ...NAL	☒ SALES JOURNAL	☐ SUBSIDIARY LEDGERS	☐ BANK STATEMENTS	☐ PURCHASE INV...
	☐ GENERAL JOURNAL	☐ RECORD OF INVENTORY	☐ DEPOSIT TICKETS	☐ SALES ORDERS
...CHASES JOURNAL	☒ GENERAL LEDGER	☐ CANCELLED CHECKS	☐ SALES INVOICES	☐ SINGLE ENTRY JOURNAL

...LE ENTRY	☐ COMPLETE	☒ AGREE WITH RETURN	☐ CASH BASIS	INADEQUATE RECORDS NOTICE SENT ☐ FORM 7020 ☐ FORM
...BLE ENTRY	☐ INCOMPLETE	☐ DO NOT AGREE WITH RETURN	☒ ACCRUAL BASIS	DATE ISSUED
...ER BASIS ...ify)				

...TATIVE ADDITIONAL INCOME DISCLOSED BY EXAMINATION TO DATE: (If excise - Additional taxable sales)

...LE PERIOD	RETURN FORM	PER RETURN	CORRECTED	ADDITIONAL	METHOD USED IN DETERMIN...
...29, 1960	1120	$ 30,235.76	$ 82,140.94	$ 51,905.18	Specific item
...30, 1960	1120	280,561.07	883,450.42	602,889.35	"

...tion due to the tentative additional income is due to purely technical adjustments (Give details)

...60 - $ 11,835.30, see exhibit A
...60 - $178,467.51, see exhibit A

...ment, if any, taxpayer has made regarding cash-on-hand, gifts inheritances and other non-taxable sources of income.

None

DIRECTOR OF INTERNAL REVENUE
INTELLIGENCE DIVISION
RECEIVED
FEB 19 1964
RECEIVED
INDIANAPOLIS, INDIANA

...ipts of taxpayer
...OSITED ☐ MOST DEPOSITED ☐ PART DEPOSITED ☐ NONE DEPOSITED

...ination discloses acts of ...ealment or deliberate mis-...ments of facts by taxpayer ...tend to enhance prosecution ...tial. See Item 12
☐ NO

7b. If yes, specify details

...Adjust 2707...

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1968 — April Session, 1969

No. 17409

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ARNOLD F. HABIG and
JEROME M. SCHROERING,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

July 28, 1969

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and GRANT, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* This case arises on the Government's appeal under 18 U. S. C. § 3731 from an order suppressing certain evidence. In August 1966, defendants were indicted for attempting to evade the income taxes of four corporations and for aiding and assisting in the preparation of a fifth corporation's[2] false income tax re-

[1] Chief Judge Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

[2] The five corporations, known as the Jasper Group, were the W. W. Kimball Company, Evansville Veneer & Lumber Co., Inc., The Jasper Corporation, Borden Cabinet Corporation and Lafayette Manufacturing Co., Inc.

turn, in violation of Sections 7201 and 7206(2) of the Internal Revenue Code. Two years after the filing of the indictment, the defendants filed a motion to suppress the records of the five corporations that "were photocopied by agents of the Internal Revenue Service during the investigation by them of possible criminal violations of federal income tax laws by the defendants," and seeking the return of the photocopies. The ground for the motion was that the items were "illegally seized without search warrant, summons or subpoena being served upon or against either defendant." The supporting affidavits of each defendant asserted that:

> "approximately two years prior to the [August 12, 1966] date of the return of the indictments in this cause, agents of the Internal Revenue Service were seeking to obtain evidence for the purpose of criminally prosecuting him, but at no time was he ever informed or advised by any such agent that he was being investigated for criminal violations of the federal tax laws."

The Government denied the first of these allegations and also filed an affidavit of Revenue Agent Charles E. Lawrence. This affidavit disclosed that Lawrence was assigned to investigate the income tax returns of these five corporations in the early part of 1963. The affidavit also disclosed that the case was "subsequently" referred (by Lawrence) to the Intelligence Division of the Internal Revenue Service and that Special Agent Russell C. Hicks was assigned to the case. The date of his assignment was not revealed. The first meeting between Messrs. Hicks, Lawrence, and defendant Schroering (the comptroller of the corporations) occurred on September 21, 1964, and Schroering was then advised that Hicks was a special agent "assigned to determine if there was any criminal tax fraud in connection with the returns being examined."

A representative of the accounting firm for the corporations was also present at the meeting. The examination and photocopying of the corporate records were always pursuant to "the consent of a corporate officer or representative."

After the filing of these affidavits, the district court held an evidentiary hearing at which defendant Habig, the chairman of the boards of the five corporations, and Revenue Agent Lawrence were witnesses. At the hearing and again at oral argument before this Court, the Government conceded that the defendants had standing to question the copying of the corporate records. The district court found in substance as follows:

> Internal Revenue Service agents obtained certain records of the five corporations containing evidence material to the prosecution of the indictment against the defendants. These records were obtained without a search warrant, summons or subpoena. In March 1963, Revenue Agent Lawrence was assigned to examine the income tax returns of the five corporations "for civil liability." Through the public accounting firm representing the corporations, he was referred to defendant Schroering with respect to his dealings with the corporations.
>
> In late 1963, Lawrence referred the matter to the Intelligence Division of the Internal Revenue Service because he suspected criminal violations. Special Agent Hicks was subsequently assigned to make a criminal investigation of the returns, but the date of his assignment is unknown.[3] Lawrence did not advise the corporations or their accounting firm of his referral to the Intelligence Division. Hicks and Lawrence called on defendant Schroering and a repre-

[3] A second affidavit of Revenue Agent Lawrence was filed below in support of the Government's unsuccessful motion for rehearing. It shows that Lawrence referred the matter to the Intelligence Division on February 11, 1964, and that the case was assigned to Special Agent Hicks on March 27, 1964. This was confirmed by the affidavit of the Indianapolis chief of the Intelligence Division.

sentative of the accounting firm in late September 1964. At this meeting, the corporations first learned that their returns were being criminally investigated. The district court inferred that Lawrence fulfilled his duty to disclose to Hicks the evidence and leads acquired between late 1963 and September 1964. The court also inferred that the corporations' and defendants' consent to examine and copy corporate records after September 1964 would not have been given if the agents had "disclosed their conduct from late 1963 to September 1964."

On these findings, the trial court concluded that the records and leads were obtained while the Government was conducting a criminal investigation "during the period from late 1963 to September of 1964 but while the defendants and said corporations believed plaintiff was conducting a civil tax investigation due to the agent's [apparently Revenue Agent Lawrence] representations and his failure to advise them otherwise." The court further found that "defendants and the said corporations never consented to the search for the evidence for criminal investigation purposes during the period from late 1963 to September 1964." Accordingly, the court suppressed the photocopies of the corporate documents discovered by the Government during the one year period preceding the September 1964 meeting between Revenue Agent Lawrence, Special Agent Hicks, defendant Schroering, and the representative of the corporations' accounting firm. Also suppressed was all evidence obtained as the fruits of the investigation carried on during that period.

The briefs of the respective parties before this Court evidence a fundamental dispute as to the nature of the question presented by this case. The Government has elected to treat this case as a companion to *United States* v. *Dickerson*, No. 17349, which was argued here on the same day. As in *Dickerson*, the Government argues that the suppressed

evidence was not illegally obtained even if the defendants believed that the investigation was purely civil and even if the IRS agents did not advise defendants that the investigation had become criminal. Defendants strongly and repeatedly object to any such characterization of this case, arguing that the only question presented is whether the district court erred in holding that the Government had failed to sustain its burden of proving that the evidence in question was lawfully procured without the issuance of any search warrant or subpoena. Throughout the proceedings below counsel for defendants stressed the absence of "informed consent" as the fatal weakness in the Government's case.

A reading of the exhibits and the testimony received below demonstrates that the parties are not in disagreement that Agent Lawrence was in fact allowed to inspect various corporate records. The essential point of dispute, and the issue on which the district court's findings of fact turn, is whether such consent was vitiated when the purpose of the investigation shifted from civil to criminal. Viewed in this light, we are of the opinion that the issue presented for decision in the present case does depend upon the obligation of the IRS agents to inform the defendants of the purpose of their investigation and of the rights which attach to one under criminal investigation. Accordingly, this case will be considered in the light of the principles announced this day in *United States* v. *Dickerson*, No. 17349.

In its principal brief, the Government admits that the suppression order was proper if *United States* v. *Turzynski*, 268 F. Supp. 847 (N. D. Ill. 1967) was correctly decided. In *Dickerson*, we have approved the rationale of the *Turzynski* case and have held that the advice of constitutional rights prescribed in *Miranda* v. *Arizona*, 384 U. S. 436, must be given to taxpayers suspected of criminal violations "by either the revenue agent or the special agent at the inception

of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (_____ F. 2d at p. _____).

According to one of the supplemental affidavits filed by the Government (see note 3 *supra*), all the records covered by this suppression order were examined by Lawrence prior to his referral of the case to the Intelligence Division, and no leads from that material were obtained by him between the referral and the aforesaid September 1964 meeting. If the Internal Revenue Service obtained all this evidence and the leads prior to the first contact with the defendants after the February 19, 1964, reference to the Intelligence Division or if any evidence obtained illegally thereafter was merely duplicative, the suppression order may not stand. Since the above facts were presented by the Government by way of affidavits in support of a motion for rehearing which was denied by the district judge despite his apprehension about a possible miscarriage of justice, a determination of the precise order of events is impossible on the present state of the record. Therefore, without implying any criticism of the district court's disposition of the Government's rehearing motion, we have determined that the interests of justice require a remand for a further hearing in order to develop the facts necessary to the application of the standards subsequently announced in *Dickerson*.[4]

[4] We have no occasion in this case to consider the possible abuse of our holding in *Dickerson* by unreasonably delaying the initial reference to the Intelligence Division in order to avoid the effect of the warnings which are required after such a reference is made. Defendants suggest that the findings below support an inference that Revenue Agent Lawrence continued his investigations in aid of the Special Agent, who remained unknown to defendants until the September 1964 meeting. Such an inference depends on the actual chronology of events, which may be affected by the findings to be made on remand.

The order is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

17409

FAIRCHILD, *Circuit Judge* (concurring in part, dissenting in part).

I agree that the suppression order should be vacated, but disagree with the direction to apply the *Dickerson* standards.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1968 — April Session, 1969

No. 17349

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ALBERT DICKERSON,
Defendant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 28, 1969

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and GRANT, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* In April 1967, defendant was indicted for failure to file income tax returns for 1960, 1961 and 1962 in violation of Section 7203 of the Internal Revenue Code (26 U. S. C. § 7203). In March 1968, claiming a violation of his rights under the Fourth and Fifth Amendments, he filed a motion for the return of certain property and for the suppression of evidence. The motion was based on the admitted failure of the Internal Revenue Agents to warn him of his constitutional rights during five interviews with him.

[1] Chief Judge Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

Based on an affidavit of defendant and the testimony of Revenue Agent Donald Petrovic at the hearing on the motion to suppress, the district court found that while "auditing" a scavenger company Petrovic found an entry on its books reflecting a large payment to defendant but that the company had filed no related information return. Consequently in July 1964, Petrovic "audited" defendant, who admitted that he had failed to file certain income tax returns. Late that year Petrovic referred the case to his superiors to determine if the case warranted criminal investigation. In January 1965, the case was assigned to Special Agent Cornue, an investigator for the Intelligence Division of the Internal Revenue Service. The jurisdiction of the Intelligence Division is limited to criminal investigations. Petrovic was assigned to assist Cornue. Their joint investigation began on March 24, 1965, with a visit to defendant at his place of business. On that occasion, Cornue identified himself as a Special Agent but did not advise defendant that the investigation had become criminal, nor was defendant advised of any of his constitutional rights. Petrovic and Cornue again saw defendant on May 7, 1965, and Cornue alone interviewed defendant on March 29, April 1, April 6[2] and June 24, 1965.

Cornue's affidavit in support of the Government's motion for reconsideration showed that at the June 24, 1965 interview, defendant said he had engaged a lawyer and had given him "everything he could find that had anything to do with his income tax." Defendant's lawyer was present when defendant was next interviewed by both agents on November 10, 1965.

The Government's brief concedes that the indictment resulted from the information gathered at five of the

[2] The April 6 interview is identified in Special Agent Cornue's affidavit of November 5, 1968.

earlier interviews. These are the occasions when, according to his affidavit, defendant answered the agent's questions and furnished them with documentary and oral information. This affidavit claims that the records surrendered to the agents consisted of personal records of income and expenses, including the names of customers and names of persons to whom commission payments were made.

Relying on *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, the district court held that "at and from the time a criminal investigation is launched against a taxpayer," IRS Agents are required to inform him of his right to remain silent, that anything he says may be used against him, and that he has a right to counsel. The *Escobedo* opinion was handed down before the civil or criminal investigations of defendant's tax returns had begun, and *Miranda* was handed down more than a year after the crucial interviews. However, the district court noted that *Miranda* is applicable to all cases filed (as here) after its promulgation.

Applying the *Miranda* rationale, the trial court held that the evidence obtained from defendant during the criminal investigation and before his retention of counsel would have to be suppressed, along with any evidence obtained as a result of information gained during that phase of the criminal investigation. 291 F. Supp. 633. The Government appealed under Title VIII of the Omnibus Crime Control Act (18 U. S. C. § 3731).[3] We affirm.

[3] Taxpayer asserts that 18 U. S. C. § 3731 violates his rights to due process and a speedy trial insofar as it permits the Government to appeal from an adverse ruling on a motion to suppress. This point was not pressed at oral argument, and, in light of our disposition of the principal issue presented in the taxpayer's favor, does not merit extended treatment here. Far from suggesting a lack of legislative power to authorize such interlocutory appeals, *Carroll* v. *United States*, 354 U.S. 39, 407, relied on by the taxpayer here decided only that such appeals were not authorized by statutes then in force. The Court noted, "If there is serious need for appeals by the Government from suppression orders * * * it is the

Both parties seek to find support for their positions in the *Miranda* decision, the Government stressing the physical custody in which the interrogations involved in *Miranda* and its companion cases took place and defendant laying heavy emphasis on the policies underlying the adoption of the *Miranda* warnings. We recognize the factual limitations of the precise holding in *Miranda*. On the other hand, we cannot accept an interpretation of that decision which would restrict the implementation of the Court's overriding concern with the opportunity for intelligent exercise of constitutional rights to interrogations conducted in police stations. Indeed, the opinion makes clear that the privilege against self-incrimination is imperiled when one "deprived of his freedom of action in any significant way" (384 U. S. at pp. 444, 445, 467, 477, 478) is subjected to interrogation without being apprised of his right to remain silent, the consequences of a decision to forego that right, and the right to the presence of an attorney, retained or appointed, to assist in making that decision. And the Court has recently confirmed that these warnings are required prior to interrogating a suspect in his own bedroom if it appears he is not free to go where he pleases. *Orozco* v. *Texas,* 394 U. S. 324.[4]

Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. See 384 U. S. at pp. 475-476. The Government's brief appears to recognize that ignorant compliance with the requests of the authorities can no longer be equated with a valid waiver of constitutional rights.[5] We understand

function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases."

[4] The opinion does not appear to depend upon a formal arrest, and no mention is made of whether Orozco in fact knew that he was not free to leave.

[5] *Powers* v. *United States,* 223 U.S. 303, and *Wilson* v. *United States,* 162 U.S. 613, are cited as "prior law."

the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660, 668 (1966).

In this Circuit, the district courts recently considering the question have uniformly held that some form of warnings must be given by IRS agents once an investigation has shifted to one criminal in nature, despite the absence of physical custody.[6] The Government has drawn to our attention numerous cases in this and other Courts of Appeals which are said to establish that *Miranda* has no application to criminal tax investigations. Our examination of those and other cases decided after *Miranda* re-

[6] *United States* v. *Turzynski*, 286 F.Supp. 847 (N.D. Ill. 1967); *United States* v. *Dickerson*, 291 F.Supp. 633 (N.D. Ill. 1968); *United States* v. *Habig*, No. IP 66-CR-138 (S.D. Ind. Nov. 19, 1968) (unreported); *United States* v. *Lackey*, Lafayette Criminal No. 177 (N.D. Ind. Oct. 2, 1968) (unreported); *United States* v. *Townsend*, No. IP 65-CR-115 (S.D. Ind. Sept. 14, 1966) (unreported). To the same effect, see *Goodman* v. *United States*, 285 F.Supp. 245 (C.D. Cal. 1968); *United States* v. *Wainright*, 284 F.Supp. 129 (D. Colo. 1968); *United States* v. *Gower*, 271 F.Supp 655, 660 (M.D. Pa. 1967); *United States* v. *Kingery*, 67-1 U.S. Tax Cas. ¶ 9262 (N.D. Fla. 1967); *United States* v. *Schoenberg*, 67-1 U.S. Tax Cas. ¶ 9393 (D. Ariz. 1966). See also *United States* v. *Guerrina*, 112 F.Supp. 126 (E.D. Pa. 1953), modified, 126 F.Supp. 609 (E.D. Pa. 1955).

veals that in almost every instance some warnings were in fact given,[7] an attorney was present during the crucial interviews,[8] or the absence of physical custody was considered determinative.[9] We recognize, of course, that language appears in many of these cases which is inconsistent with the conclusion which we reach today. We therefore turn our attention to the asserted distinctions which are said to render the *Miranda* concern that any incriminating statements elicited from a suspect should be "truly the product of free choice" (384 U. S. at p. 457) inapplicable to criminal investigations by the IRS.

A line of cases originating between the *Escobedo* and *Miranda* decisions, notably *Kohatsu* v. *United States*, 351 F. 2d 898 (9th Cir. 1965), reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently "focused" on the suspect as to require that warnings be given. But as Judge Will observed in his persuasive opinion in *United States* v. *Turzynski*, 268 F. Supp. 847, 852-853 (N. D. Ill. 1967):

> "This distinction between a criminal tax investigation where the taxpayer is suspected of a fraud not yet fully identified and a criminal investigation where

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[7] *E.g.*, *United States* v. *Mansfield*, 381 F.2d 961 (7th Cir. 1967), certiorari denied, 389 U.S. 1015; *Muse* v. *United States*, 405 F.2d 40 (8th Cir. 1968); *United States* v. *Mackiewicz*, 401 F.2d 219 (2d Cir. 1968); *United States* v. *Squeri*, 398 F.2d 785 (2d Cir. 1968); *Spinney* v. *United States*, 385 F.2d 908 (1st Cir. 1967), certiorari denied, 390 U.S. 921; *United States* v. *Maius*, 378 F.2d 716 (6th Cir. 1967) certiorari denied, 389 U.S. 905; *Morgan* v. *United States*, 377 F.2d 507 (1st Cir. 1967).

[8] *E.g.*, *United States* v. *Mancuso*, 378 F.2d 612 (4th Cir. 1967), certiorari denied 390 U.S. 955; *United States* v. *Fidanzi*, No. 16984, (7th Cir. June 23, 1969).

[9] *E.g.*, *Hensley* v. *United States*, 406 F.2d 481 (10th Cir. 1968); *Cohen* v. *United States*, 405 F.2d 34 (8th Cir. 1968), certiorari denied, 394 U.S. 943; *Morgan* v. *United States*, *supra*, note 7; *Spahr* v. *United States*, 1969 CCH Tax Cas. ¶ 9316 (5th Cir. April 2, 1969).

> a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, *i.e.*, when the investigatory machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit is known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction."

Nor can the *Kohatsu* rationale, once accepted, be limited to investigations in the tax area. Such a rationale would apply to most white collar crimes and any other crimes where the identity of the suspected lawbreaker is not in issue. This category might include unauthorized practice of law, attempted bribery, impersonation of a federal officer, refusal to report for induction, violations of Section 5 of the Securities Act, the Landrum-Griffin Act, and the Sherman Act, among others. No principled distinction has been suggested which would carve out such exceptions to the policies expressed in *Miranda*.

Such a distinction cannot survive the Supreme Court's decision in *Mathis* v. *United States*, 391 U. S. 1, where the Government sought to escape the application of *Miranda* to an interrogation of a taxpayer incarcerated for an unrelated offense because the questions were asked as a part of a routine tax investigation where criminal proceedings might never be brought. Noting that "tax investigations frequently lead to criminal prosecutions, just as the one here did," (391 U. S. at p. 4), the Court rejected any such distinction as "too minor and shadowy" to warrant a departure from *Miranda*.

The Government argues that the absence of custodial detention and other indicia of criminal prosecution in the tax fraud investigation negatives any possibility of coer-

cion or overbearing of the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe. As the district judge observed (291 F. Supp. at pp. 636-637):

> "It would seem to us that the average citizen, faced with repeated questioning by two government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigator from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities."

Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents. Nor would he be likely to make any distinction between revenue agents and special agents without some explanation as to the different functions of these two offices. As noted in Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 F. R. D. 323, 336 (1968) the pressures on the uninformed taxpayer to cooperate with the agents are considerable:

> "First there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. *The average citizen, moreover, believes the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes.* Who would believe the ironic truth that the cooperative taxpayer fares much worse than the in-

dividual who relies upon his constitutional rights!" (Emphasis supplied.)

Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings. Cf. *Gouled* v. *United States*, 255 U. S. 298 305-306; *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1953), modified, 126 F. Supp. 609 (E. D. Pa. 1955); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul. L. Rev. 862, 864-865 (1968).

Under such circumstances it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents. "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." *Miranda* v. *Arizona*, 364 U. S. 436, 468. The rationale behind the warning as to the consequences of waiving the right to remain silent, as expressed in *Miranda*, is particularly apt to the present situation, for "this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest." 384 U. S. at p. 469. As in *Miranda*, we deem advice as to the right to have counsel present a valuable adjunct to the protections of the Fifth Amendment prescribed above.

Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent[10] or the special agent at the inception of the first contact with the tax-

[10] In *Mathis*, the Supreme Court required a revenue agent to give the warnings upon first questioning the taxpayer, even though no "full-fledged criminal investigation" was begun until eight days later. See 391 U.S. at p. 4. There the suspect was in custody for

payer after the case has been transferred to the Intelligence Division.[11] We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind.[12] Absent such warnings, the motion to suppress in the present case was properly granted.

In recognition of the fact that this holding represents a departure from the present state of the law,[13] and a new implementation of the *Miranda* policy, and in accordance with the criteria set forth in *Stovall* v. *Denno*, 388 U. S.

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an unrelated offense. Mindful of the disruptive effect which a blanket requirement of warnings might have if applied to all civil investigations, we have determined that the inception of the first contact with the taxpayer after referral to the Intelligence Division is the appropriate point at which to require the *Miranda*-type warnings outlined above.

[11] See Andrews, "The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The 'Critical Stage,'" 53 Iowa L. Rev. 1074, 1085-1087, 1111, 1116-1117 (1968); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul. L. Rev. 862, 870 (1968).

[12] Thus there is no conflict in this respect with *United States* v. *Spomar*, 339 F.2d 941 (7th Cir. 1964), certiorari denied, 380 U.S. 75, on which the Government has so heavily relied. Moreover, that was a pre-*Miranda* case, and the defendant did not contend that revenue agents had the duty to advise him of his right to refuse to furnish the requested information (339 F.2d at p. 942)

[13] We are informed that since May 1967 the Internal Revenue Service has required special agents to give a modification of the *Miranda* warnings to taxpayers at the first interview. See *United States* v. *Turzynski*, 268 F.Supp. 847, 854 (N.D. Ill. 1967). The November 1967 instructions to special agents are reproduced in *United States* v. *Wainright*, 284 F.Supp. 129, 133 (D. Colo. 1968). These instructions were somewhat amplified in November 1968 according to IRS News Release IR-949 (1969 CCH Fed. Tax Rptr., ¶ 6946).

This recent administrative practice, characterized as an act of grace at oral argument, diminishes the impact of our holding today, but does not, in our view, obviate the responsibility of this Court to render judgment in accordance with our understanding of the intendment of *Miranda*.

293, 297, we have determined that this decision should be given a prospective application. In *Johnson* v. *New Jersey*, 384 U. S. 719, *Miranda* was applied only to cases in which the trial began after the date of the *Miranda* decision. However, as the Court noted in a more recent case involving a special aspect of the retroactivity of *Miranda*, the approach of the Court to prospective decision-making has undergone some modification since *Johnson* was decided. See *Jenkins* v. *Delaware*, ... U. S. ....., 37 U. S. L. W. 4458 (June 2, 1969). In conformity with the more recent practice as developed in *Stovall*, *supra*, and *Desist* v. *United States*, 394 U. S. 244, we have determined to apply our holding to interrogations taking place after the date of this decision. See Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N. Y. U. L. Rev. 631, 646 (1967); Fairchild, "Limitation of New Judge-Made Law to Prospective Effect Only: 'Prospective Overruling' or Sunbursting," 51 Marq. L. Rev. 255, 265 (1968). The defendant in the companion *Habig* case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today. See *Desist* v. *United States*, 394 U. S. 244, 259 (Harlan J., dissenting).

AFFIRMED.

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FAIRCHILD, *Circuit Judge* (dissenting)

The *Miranda*[1] equation is that official questioning of one who is in custody or deprived of his freedom of action in any significant way equals compulsion to answer unless the *Miranda* warnings or other effective means are used to insure absence of compulsion. Underlying its pronouncement were years of judicial experience with the frustra-

[1] *Miranda* v. *Arizona* (1966), 384 U.S. 436.

tions of case by case decision as to the voluntariness of statements given by persons in police custody (most often state or local) *Mathis*[2] and *Orozco*[3] decide that the equation is valid in the particular situations considered, but do not suggest that compulsion to answer is to be presumed in situations where the person is not in custody or deprived of freedom of action.

It is compulsion to answer which offends against the fifth amendment provision that no person shall be compelled in any criminal case to be a witness against himself *Miranda* decided that one in custody or deprived of freedom of action and questioned by an officer is subjected to such pressure to answer that the warnings are required in every instance.

This court is now deciding, essentially, that the official character of the revenue agent makes compulsion to answer his questions so probable that the warnings are required to prevent it. Yet the court distinguishes between the revenue agent before IRS has internally decided to consider prosecution and the revenue agent or special agent after such decision.

If a violation of the fifth amendment is really involved, I assume there are types of state agents as well as other types of federal agents who will be reached by this decision.

I think that candor on the part of a special agent who is seeking incriminating evidence is good governmental policy, and, as noted in Judge Cummings' able opinion, the IRS has decided as a matter of policy that warnings should be given. It may well lie within federal judicial power to decide to exclude evidence obtained without such candor. But I do not believe the fifth amendment requires it.

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[2] *Mathis* v. *United States,* (1968), 391 U.S. 1.

[3] *Orozco* v. *Texas* (1969), 394 U.S. 324.

APPENDIX E

UNITED STATES DISTRICT COURT
For the Seventh Circuit
Chicago, Illinois 60604

January 24, 1973

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
ARNOLD F. HABIG and JEROME M. SCHROERING,
Defendants-Appellees.

No. 71-1654

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

OPINION BY CHIEF JUDGE SWYGERT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of suppression of the said District Court in this cause appealed from be, and the same is hereby, vacated, insofar as that order covered the corporate records of Jasper and its subsidiaries and any leads which the Government agents obtained from those records during their investigation. In all other respects, the order is Affirmed, and this cause be and the same is hereby Remanded to the said District Court for trial, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1159

ARNOLD F. HABIG AND JEROME M. SCHROERING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The suppression order of the district court (Pet. App. B) is not reported. The decision of the court of appeals on a prior appeal by the United States from a suppression order (Pet. App. C) is reported at 413 F. 2d 1108, certiorari denied, 396 U.S. 1014.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. E) was entered on January 24, 1973. The petition for a writ of certiorari was filed on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]In an earlier case involving this prosecution, *United States v. Habig*, 390 U.S. 222, this Court reversed the judgment of the district court dismissing certain counts of the indictment as barred by the statute of limitations.

QUESTIONS PRESENTED

1. Whether, in a tax fraud investigation conducted jointly by a revenue agent and a special agent of the Internal Revenue Service, corporate officers who are not in custody or subject to any restraint are entitled to receive *Miranda* warnings before being requested to furnish corporate records relevant to the tax liabilities of the corporations whose tax returns are being investigated.

2. Whether the prior concession by the government that petitioners, as corporate officers, had standing to raise a motion to suppress evidence obtained in the course of a search of corporate records estops the government from contending that the searches were in fact reasonable and lawful.

STATEMENT

1. In 1966, petitioners were indicted in the United States District Court for the Southern District of Indiana for attempting to evade taxes of corporations of which they were officers, in violation of 26 U.S.C. 7201, and for aiding in the preparation of false corporate tax returns, in violation of 26 U.S.C. 7206(2). The district court dismissed two counts of the indictment and, on direct appeal by the government, this Court reversed. *United States* v. *Habig*, 390 U.S. 222.

Petitioners then filed a motion for the suppression and return of all photocopies of corporate records made by investigating Internal Revenue Service agents (I R. 13-14).[2] The basis of the motion was that no search warrant, subpoena, or summons had been served upon either petitioner for such records and that neither petitioner had been warned by any agent that he was being investigated for criminal tax violations. The government conceded

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[2] "I R." refers to the appendix filed in the court of appeals in connection with the first appeal from the district court's suppression order. "II R." refers to the appendix filed in the court of appeals in the instant proceedings.

that petitioners would be aggrieved persons if the corporate records had been illegally seized but denied that the search and seizure were unlawful (I R. 73, 75). The district court found that in December 1963 the investigation had been referred to the Intelligence Division of the Internal Revenue Service and at that point had become focused on the possibility of criminal tax violations (I R. 27-30). The court thereupon suppressed all the corporate records examined and copied after 1963.

On appeal by the government from the suppression order, the case was heard and decided by the court of appeals together with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7) (Pet. App. D), which involved a government appeal from an order of the District Court for the Northern District of Illinois holding that *Miranda* warnings must be given to any individual taxpayer who is interviewed by revenue agents after his case has been referred to the Intelligence Division of the Internal Revenue Service. The government, without distinguishing between demands on corporate officers for corporate records and requests to individuals for personal statements or records, took the position that a decision by the court of appeals would be applicable to both cases. The court of appeals, accepting this view of the cases, affirmed in *Dickerson* and remanded the present case for further findings and an application of the principle stated in *Dickerson*, *i.e.*, that *Miranda* warnings are required to be given at the outset of non-custodial, pre-arrest interrogations of suspects in criminal tax investigations.

2. On remand, the district court, after evidentiary hearings, found that the case had been referred to the Intelligence Division in February 1964 and that the criminal investigation by the Intelligence Division first began on March 27, 1964 (II R. 12). The court further found that various records were inspected and copied after that date and that the consent of petitioner

Schroering to the inspection had been obtained without his being warned of the true nature of the investigation (II R. 12-14).

On September 21, 1964, the investigating agents had met with petitioner Schroering and the corporations' independent accountant, and the special agent announced that his role was to determine if any criminal violation had been committed (II R. 21). Thereafter, the agents obtained various other records from the corporations with petitioners' consent, but the district court found that such records would not have been voluntarily furnished had the corporations and petitioners known of the "deceit" practiced prior to September 21, 1964 (II R. 27-28). The district court found that the leads acquired by the revenue agent prior to the referral of the case to the Intelligence Division were not duplicative of records examined thereafter because, although the revenue agent testified that he had memoranda of the invoice numbers, he could not recall from memory the detailed contents of the records which he had re-examined during his joint investigation with the special agent (II R. 28).

The district court concluded that the failure of the agents to advise petitioners of their constitutional rights after the case was referred to the Intelligence Division vitiated petitioners' further consent to the inspection and copying of the corporate records (II R. 28-30). The district court therefore suppressed all corporate records and information obtained after the referral to the Intelligence Division and all statements obtained by interviews with petitioner Schroering.

3. The government appealed this order insofar as it applied to corporate records, but, in view of the holding in *Dickerson*, no appeal was taken from the order suppressing personal statements made by petitioner Schroering. The court of appeals reversed, hold-

ing (1) that the government was not precluded from contesting the suppression order as to corporate records by reason of its improvidently broad concession, in the prior appeal, that the facts of this case were indistinguishable from those in *Dickerson*, and (2) that its earlier decision in *Dickerson* did not require that a corporate officer be given advisory warnings before being requested to produce corporate records in a criminal tax investigation of the corporation.

ARGUMENT

1. Petitioners now contend (Pet. 10-15), apparently for the first time, that the corporate records photocopied by the investigating agents were obtained as a consequence of interviews conducted with petitioners in their individual capacities and as such should be suppressed as "fruit of the poisonous tree." This contention fails for two separate reasons.

First, the record does not support petitioners' assertion that leads to corporate documents resulted from statements made by petitioners acting in their individual capacities. To the contrary, all leads to corporate records provided by petitioners stemmed from statements made in their capacities as corporate officers (Pet. App. A, A6). As the court of appeals correctly held, petitioners, as corporate officers, had no right to refuse production of corporate records because they personally might be incriminated by the records. *Wilson* v. *United States*, 221 U.S. 361. Since petitioners had no Fifth Amendment rights to assert in their capacities as corporate officers, *Miranda* warnings were unnecessary even assuming *arguendo* the correctness of the Seventh Circuit's decision in *Dickerson*. Therefore the statements made by petitioners as corporate officers, and the information subsequently obtained on the basis of those statements, are properly

admissible against them and should not have been suppressed by the district court.[3]

Second, the non-custodial, pre-arrest interviews of petitioners did not have to be accompanied by *Miranda* warnings, and any leads provided during such interviews would in any event not have been obtained in violation of petitioners' rights. The Seventh Circuit's rule, stated in *Dickerson*, that such non-custodial interviews must be preceded by full warnings has been correctly rejected in the other circuits.[4] The *Miranda* rule applies only where the interviewed suspect is in physical custody or subjected to some restraint which circumscribes his freedom. Petitioners, by contrast, were never in custody or subjected to restraints.

2. Petitioners also contend (Pet. 15-21) that the court below erroneously ignored the government's prior stipulation that they had standing to raise the motion

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[3]As the court below noted (Pet. App. A, A9), the corporations themselves had no basis for claiming an unreasonable search and seizure of their records.

[4]Every other court of appeals that has considered the question has held that, since the taxpayer is not in custody or deprived of his freedom in any significant way, the requirements of *Miranda* do not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481 (C.A. 10). The government has consistently opposed certiorari in such cases, notwithstanding the conflict, on the ground that since the Internal Revenue Service now provides full *Miranda* warnings upon the initiation of the criminal investigation the Seventh Circuit rule is rarely of significance.

to suppress, *i.e.*, that they would be aggrieved persons if the corporate records had been illegally seized. See pp. 2-3, *supra.* But this stipulation did not estop the government from contending, as it did below, that the corporate records were validly obtained. The stipulation provided only that if the corporate records had been illegally seized, petitioners as corporate officers would have standing to seek suppression of the records. See *Mancusi* v. *DeForte,* 392 U.S. 364. This concession may have been broader than was necessary, but it did not prevent the court of appeals from holding that the records were obtained legally and reversing the district court's suppression order on that ground.[5]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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APRIL 1973.

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[5]Petitioners apparently confuse the government's stipulation as to standing with its position, at the time of the first appeal to the court of appeals, that the same principles would apply to the facts of both this case and *Dickerson.* Of course, the government still takes that position and urges that *Dickerson* was wrongly decided. See p. 6, *supra.* However, the position taken by the government at that time should not bar it from now distinguishing *Dickerson.* On this aspect of this case we rely on the opinion below. See Pet. App. A, A5.